Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

MARTIN A. ARMSTRONG,

Petitioner,

v.

JOSEPH R. GUCCIONE, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK; MARVIN D. MORRISON, WARDEN, METROPOLITAN CORRECTIONAL CENTER; and ALAN M. COHEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the protections and limitations of 28 U.S.C. § 1826(a), which apply "*[w]henever* a witness in *any* proceeding before or ancillary to any court or grand jury of the United States refuses . . . to comply with an order of the court to testify or provide other information" (emphasis added), inapplicable to a contemnor who is ordered to turn over evidence that will be used against him in his already-indicted criminal case?

2. Does the indefinite imprisonment of a citizen for civil contempt, on the purported authority of inherent judicial power and the federal criminal contempt statute, 18 U.S.C. § 401(3), violate the requirement of 18 U.S.C. § 4001(a) that "[n]o citizen may be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress?"

3. May a judge, consistent with the Due Process Clause, imprison a civil contemnor for more than *seven years*, where there has been no finding that further incarceration will produce compliance, and in disregard of an overwhelming inference, based on the length of his detention, that the contemnor cannot comply?

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 470 F.3d 89 (2d Cir. 2006). App. 1a. The Second Circuit affirmed the December 23, 2004, decision of the United States District Court for the Southern District of New York, which is reported at 351 F. Supp. 2d 167 (S.D.N.Y. 2004). App. 55a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 27, 2006. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On February 21, 2007, Justice Ginsburg granted an extension of time to file this petition until March 19, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Self-Incrimination Clause of the Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person . . . shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The provisions of 18 U.S.C. § 401(3); the Non-Detention Act, 18 U.S.C. § 4001(a); and the Recalcitrant Witness Statute, 28 U.S.C. § 1826(a), are reproduced at App. 75a.

STATEMENT OF THE CASE

This case involves fundamental questions about the power of a federal district court to impose a term of indefinite incarceration as a sanction for civil contempt. Sitting without a jury and applying civil burdens of proof, a judge held petitioner Martin A. Armstrong (Armstrong) in contempt for failing to

turn over certain items of property that were alleged to be in his possession. The judge ordered him imprisoned in the Metropolitan Correctional Center in New York City, where Armstrong, unable to purge his contempt, has remained for the last seven years. Armstrong's incarceration is already more than twelve times as long as the term that would have entitled him to a jury trial if his sanction had been denominated criminal rather than civil, *see Bloom v. Illinois*, 391 U.S. 194 (1968); more than four times as long as the term that Congress deems a punitive sanction for contempt, *see* 28 U.S.C. § 1826(a); and nearly fifty percent longer than the maximum criminal sentence Armstrong faces for the underlying conduct, *see* note 3 *infra*. He is now the longest-serving federal civil contemnor in U.S. history.

The Second Circuit found no error in the imprisonment of Armstrong for that period, and held that due process does not require his incarceration *ever* to end. That decision represents a radical and extreme expansion of a contempt power that by its nature is an "anomaly" in the law and one that "uniquely is '"liable to abuse."'" *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 831 (1994) (quoting *Bloom v. Illinois*, 391 U.S. 194, 202 (1968) (quoting *Ex Parte Terry*, 128 U.S. 289, 313 (1888))). Emphasizing this point, this Court has expressly declared that a civil contemnor cannot be held forever. *See Maggio v. Zeitz*, 333 U.S. 56, 76 (1948). Out of concern that a term of civil incarceration not become punitive, Congress also has fixed the maximum time that a federal witness may be held who does not comply with a judicial order at eighteen months. *See* 28 U.S.C. § 1826(a). And the other circuits have recognized doctrines designed to guarantee that a civil contempt sanction at all times retains its coercive – rather than a punitive – purpose. The Second Circuit rejected all of these limitations when it upheld Armstrong's unprecedented sanction.

Review is needed not only to resolve the conflict between the Second Circuit's decision and these well-established

precedents, but also to clarify the standards that apply to the civil contempt process.

A. Background of the Contempt Order

Armstrong was an officer and director of two corporations (the Princeton companies) that issued promissory notes to Japanese institutional investors. On September 13, 1999, Armstrong was charged in a criminal complaint with defrauding investors. Two weeks later, he was indicted for securities fraud. The indictment alleged, in part, that Armstrong had misappropriated millions of dollars obtained from investors to purchase rare coins and antiquities. App. 92a-93a ¶ 6, 103a ¶ 30(d).

Also on September 13, 1999, the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) brought twin enforcement suits against Armstrong and the Princeton companies, alleging securities and commodities fraud, based on the same underlying conduct as the criminal case. The SEC and CFTC obtained an *ex parte* temporary restraining order, later converted into a preliminary injunction, freezing all of the Princeton companies' assets, appointing a Receiver for the companies, and ordering Armstrong to turn over all corporate assets in his possession or control. App. 4a-5a. Pursuant to those orders, the Receiver served a subpoena *duces tecum* on Armstrong demanding that he produce several computers, antiquities, gold bars, and gold coins alleged to be corporate property. Virtually assured that anything he turned over would be used against him in the already-indicted criminal case, Armstrong asserted his Fifth Amendment privilege and did not produce the demanded items.[1] The Receiver moved to hold Armstrong in civil contempt.

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[1] The Receiver and foreign liquidators appointed over one of the Princeton companies entered into a Memorandum of Agreement, which provided that they would help the United States Attorney's Office, SEC, and CFTC collect evidence for use in Armstrong's criminal and civil prosecutions.

On January 7, 2000, the District Court conducted its first contempt hearing, at which the Receiver presented evidence that Armstrong had once possessed the demanded corporate property, in some instances many years earlier. The District Court ruled against Armstrong's claim of a Fifth Amendment privilege against self-incrimination, and gave him one week to produce approximately $14 million worth of property. Left with no alternative, Armstrong located and turned over approximately $1.1 million worth of property, which he later testified was all that he still possessed or controlled.

On January 14, 2000, the District Court conducted a second hearing to determine whether Armstrong had complied with its order. At the District Court's insistence, Armstrong testified at length that he either did not have the missing items or did not know where they were, but presented evidence that he had given the majority of them to business associates either as gifts or to satisfy debts. The District Court, however, did not credit Armstrong's evidence, and adjudged him in contempt. The Court ordered Armstrong incarcerated until he complied or demonstrated his inability to do so.[2]

Since then, the District Court has held periodic hearings on Armstrong's civil contempt. Armstrong has insisted that he does not have the property demanded by the turnover orders and has argued that, in any event, the District Court lacks statutory authority to imprison him further. At one point, Armstrong contended that even assuming *arguendo* that he

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[2] Consistent with 28 U.S.C. § 1826(a), the District Court originally limited Armstrong's confinement to a maximum term of eighteen months. *See SEC v. Princeton Econ. Int'l, Ltd.*, 7 Fed. Appx. 65 (2d Cir. 2001). On July 6, 2001, one week before the first eighteen-month period was to expire, however, the Court invoked its "general and inherent equitable powers" to continue the confinement indefinitely, explaining that its original reference to eighteen months had been "unintentional." App. 79a & n.2. The Court refused to release Armstrong, stating that "I am persuaded that he is just now starting to feel some effects of his continued confinement." App. 88a. That was over five years ago.

possessed the missing corporate property, the District Court should infer that his confinement had lost its coercive force, given its failure to compel his obedience with the turnover orders. The court rejected these claims and continued the incarceration. The Second Circuit denied his appeals as interlocutory. App. 8a-9a.

A July 2004 superseding indictment returned against Armstrong reiterated that the property sought by the turnover orders was evidence that went to the very heart of Armstrong's criminal case. The superseding indictment referred to Armstrong's acquisition and possession of the property as not only acts of his fraud, but also the fruits and motive of his crimes. App. 141a-142a ¶¶ 61-63. It also alleged that computer equipment Armstrong had failed to provide contained information that was "among the *most incriminating* [evidence against Armstrong] and which clearly reflected his fraudulent activity." *Id.* at 141a ¶ 61 (emphasis added). Moreover, the civil contempt formed the basis of the Government's request for a sentencing enhancement for Armstrong's alleged obstruction of justice in not complying with the turnover orders. *Id.* at 159a ¶ 83; *see also id.* at 142a ¶63.[3]

B. Armstrong's Habeas Petition and Appeal

On August 23, 2004, Armstrong filed a petition for a writ of habeas corpus, attacking his confinement on several grounds. First, the Non-Detention Act, 18 U.S.C. § 4001(a), provides that all imprisonments of citizens by the United States must be pursuant to an express Congressional act. Second, the Recalcitrant Witness Statute, 28 U.S.C. § 1826(a), specifically limits the incarceration of witnesses who violate judicial orders to eighteen months. Third, under the Due Process Clause, civil imprisonment must end when the sanction clearly no longer

[3] On August 17, 2006, Armstrong pleaded guilty to one count of conspiracy to commit securities, mail, and wire fraud, in violation of 18 U.S.C. § 371. The maximum sentence for that offense is five years' imprisonment. *Id.* Armstrong will be sentenced on April 10, 2007.

serves its function of coercing compliance. The District Court denied relief, App. 55a, and Armstrong appealed.

The Second Circuit affirmed, noting that the appeal presented "several novel questions" relating to a district court's contempt power. App. 3a. First, it held that Armstrong's incarceration pursuant to the District Court's "inherent" contempt power was not without explicit Congressional authorization. The court recognized that such powers "do not draw from any specific grant of statutory authority," *id.* at 26a, and are not "explicitly authorized by statute," *id.* at 29a, but held that because the existence of such powers is "an incident of legislative grace," they meet the Non-Detention Act's statutory authorization requirement. Alternatively, the court held that 18 U.S.C. § 401(3), the federal *criminal* contempt provision, which empowers a court to "punish" disobedience of its orders, also authorized the non-punitive *civil* confinement in this case. *Id.* at 30a.

Next, the Second Circuit held that Armstrong was not entitled to the benefits of the Recalcitrant Witness Statute. Although many circuits have held that an order to produce physical evidence qualifies the party subject to the order as a "witness" for purposes of Section 1826, the Second Circuit ruled that Armstrong was a corporate custodian and as such had no Fifth Amendment right against self-incrimination. *Id.* at 38a. The court reasoned that Armstrong was not a "witness" under the Fifth Amendment and therefore could not be a "witness" under Section 1826. The court also held that even though Section 1826 applies to "*any* book, paper, document, record, recording or other material" (emphasis added), the coins and antiquities sought from Armstrong – but not the computers – fall outside that list. The court did not deny that these items could be used against Armstrong in his pending criminal prosecution. It decided, however, that because the Receiver – who was duty-bound to marshal evidence for the Government's criminal and civil prosecutions of Armstrong, *see* note 1 *supra* – claimed to

be seeking them only for their monetary value, Section 1826 did not apply. App. 41a.

Finally, the Second Circuit held that the Due Process Clause imposed *no* limits on the ultimate length of Armstrong's term of civil imprisonment. The court acknowledged this Court's holding in *Maggio v. Zeitz*, 333 U.S. 56 (1948), that a long period of incarceration creates a powerful inference that the contemnor is not refusing to comply with the judicial order but is simply unable to do so – a presumption on which every contemnor can eventually rely to show that he must be released. According to the Second Circuit, however, Armstrong's case was different because of the large value of the property at issue. Hence, the court held due process did not "demand that the test of [Armstrong's] obduracy end today *or, for that matter, at any specific time*." App. 47a (emphasis added).

The Second Circuit rejected any other due process limitation on the length of Armstrong's incarceration. While other circuits have held that at some point – far less than seven years – it becomes "substantially likely" that the contemnor will never comply, and therefore release is required as a matter of due process, the decision below dismissed that rule, on the ground that it would create an incentive for a contemnor to try to outlast the sanction without ever complying. *Id.* at 44a n.9.

The court therefore affirmed the denial of habeas relief. It did, however, reassign the underlying enforcement actions to a different district judge with instructions to conduct a new contempt hearing limited to the issue of Armstrong's present inability to comply with the turnover orders.[4]

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[4] Although the Second Circuit styled the reassignment as a "remand," it later clarified that it was actually reassigning a case not before it on appeal, as an exercise of its supervisory power. App. 160a. There is no question that the affirmance ended the appeal of the habeas action.

The new contempt hearing is scheduled to occur on April 4, 2007. Even if the new district judge decides to release Armstrong from his incarceration, it will not render this case moot. *See* Point IV *infra*.

Judge Sotomayor filed a separate concurrence, expressing due process concerns about the length of Armstrong's incarceration, which she found "so extreme" as to render the sanction presumptively punitive. *Id.* at 49a (Sotomayor, J., concurring). In her view, there was a constitutional limit to how long Armstrong could be held even if he was not incapable, but merely unwilling, to comply with the turnover order, because at some point the sanction would necessarily lose its coercive force. *Id.* at 53a. Nonetheless, she declined to find that limit exceeded here, even by an incarceration then many times longer than the eighteen months she considered to be the dividing line between coercive and punitive sanctions.

REASONS FOR GRANTING THE PETITION

Armstrong's seven-year detention is virtually unprecedented in American history. The Second Circuit departed from well-established principles, and broke sharply with the other circuits, when it not only approved Armstrong's imprisonment up to this time, but declared that it could last forever. The Second Circuit thereby took a contempt power that has been increasingly circumscribed in recent years and radically expanded it.

On statutory grounds, the Second Circuit's refusal to abide by congressionally-mandated restrictions on the District Court's power to incarcerate Armstrong presents novel legal issues of widespread public importance, and conflicts with the decisions of other circuits, requiring resolution by this Court.

First, review is needed to resolve the conflict between the Second Circuit's holding that Section 1826 does not apply to civil contemnors like Armstrong who are imprisoned for purportedly violating orders to turn over to the Government evidence that could be used against them in a pending criminal proceeding, and the holdings of four other circuits that the provision does apply under these circumstances.

Second, review is needed to clarify that neither the lower federal courts' "inherent," non-statutory contempt power nor

the federal criminal contempt provision, 18 U.S.C. § 401(3), satisfies the Non-Detention Act's precise and specific statutory authorization requirement to impose open-ended confinement for civil contempt. By so doing, this Court can resolve the long-standing uncertainty among the judiciary of whether Section 401(3) was intended to authorize civil contempt generally.

On constitutional grounds, the Second Circuit's ruling creates two conflicts involving two different fundamental principles. First, the court misconstrued this Court's holdings in *Maggio v. Zeitz*, 333 U.S. 56 (1948), and *Oriel v. Russell*, 278 U.S. 358 (1929), that a claim of inability to comply must be credited after some period of confinement. That rule is not only grounded in common sense, but it also safeguards against erroneous deprivations of liberty, the risk of which is unavoidable given the judicial biases that are inherently a part of the contempt process. To ignore that rule, as the Second Circuit has done, is to remove a critical safety valve that is essential to the fair application of the contempt power.

Second, the court entered into a sharp conflict with at least four circuits on the question whether due process permits a contemnor to be held who can establish – through long incarceration or otherwise – that he will never comply with the order. The other circuits hold that a contemnor must be released after he shows a "substantial likelihood" that he will not comply. By contrast, the decision below holds unambiguously that there is no such rule. This is an issue that frequently arises in contempt litigation, not only after long service of an incarcerative sanction of indefinite duration, as here, but even when a contemnor has served only a portion of a statutorily-limited term, such as a journalist imprisoned for not revealing a confidential informational source. The Second Circuit's ruling eliminates the lower court's obligation to end a term of coercive confinement for any reason besides compliance or demonstrated inability to comply.

I. There is a Conflict as to Whether the Recalcitrant Witness Statute Applies to Corporate Custodians Ordered to Turn Over Potentially Incriminating Evidence.

The Recalcitrant Witness Statute caps at eighteen months the maximum term of incarceration of a "witness" who refuses to "comply with an order of the court to testify or provide other information . . ." 28 U.S.C. § 1826(a). The legislative history – reliance on which this Court has approved as an interpretive guide, *see United States v. Euge*, 444 U.S. 707, 718 n.14 (1980) – indicates that the statute was intended to "ensur[e] that civil contempt not be used to inflict punitive periods of imprisonment." *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 426 (3d Cir. 1979). The decision below denied Armstrong the protection of Section 1826 despite the fact that the items he was ordered to produce would assuredly have been used against him in his already-pending criminal case, with the result that he has now been imprisoned four times as long as Section 1826's statutory maximum. The decision below sharply conflicts with the holdings of the other circuits, which interpret the statute broadly to include the production of physical evidence by defendants.

Every other circuit court that has considered the issue has concluded that Section 1826 applies to individuals who are ordered to produce physical evidence that could be used in a criminal case. The rationale of these cases is that the statutory language means what it says, and further that such individuals become "witnesses" for purposes of Section 1826 because the demanded items could be used against others or even themselves. *See United States v. Mitchell*, 556 F.2d 371, 384 (6th Cir. 1977) (defendants' failure to obey an order to produce voice exemplars falls under Section 1826); *accord In re Lopreato*, 511 F.2d 1150, 1153-54 & n.* (1st Cir. 1975); *In re Grand Jury Proceedings*, 567 F.2d 281, 282-83 (5th Cir. 1978); *Palmer v. United States*, 530 F.2d 787 (8th Cir. 1976) (per curiam). Similarly, Armstrong qualified as a "witness" under

Section 1826 when he was ordered to produce items that would surely be used against him as evidence in his criminal case.[5] The Second Circuit's attempts to distinguish Armstrong's case from these other decisions are not persuasive.

1. The Second Circuit held that because Armstrong, as a corporate custodian, was not a "witness" under the Fifth Amendment, he was also not a "witness" under Section 1826. App. 38a. Both the premise and conclusion of that analysis were plainly wrong under the controlling precedent of this Court. For the proposition that Armstrong was not a Fifth Amendment witness, the court cited *Braswell v. United States,* 487 U.S. 99 (1988), which held that a corporate custodian cannot resist an order to produce corporate records under the Fifth Amendment although he is protected against direct use of his production in a criminal case. But that point is irrelevant to the question of whether the custodian is a witness. *Braswell* never denied that the custodian's act of production was testimonial. To the contrary, the reason the *Braswell* Court recognized an evidentiary privilege against use of his act of production is precisely that the production *is* inherently testimonial.[6]

Moreover, this Court stated explicitly in *United States v. Hubbell,* 530 U.S. 27 (2000), that an act of production may constitute a protected testimonial communication because it entails implicit statements of fact, even in the case of a corporate custodian ordered to produce materials in response to a subpoena. *Id.* at 36 n.19 (citing, among other authorities, the *Braswell* dissent); *see also Pennsylvania v. Muniz,* 496 U.S.

[5] The District Court itself acknowledged that Armstrong was a witness in the contempt proceedings.

[6] Oddly, the decision below itself made this point: "*Braswell* recognized that a custodian's act of production on behalf of a corporation can be testimonial; it established an evidentiary privilege to prevent the government from using the custodian's act of production in a subsequent criminal proceeding against the custodian." App. 15a. The Second Circuit seemed unable to appreciate that for this very reason the custodian was deemed a witness, even if he could not assert a Fifth Amendment privilege.

582, 594 n.9 (1990). After *Hubbell*, no question remains about the custodian's status as a Fifth Amendment witness because the production is testimonial.

Even if the decision below were correct as to the Fifth Amendment, it would say nothing about whether Congress intended such a contemnor to receive the protections of Section 1826. Congress may well have decided that even if a corporate custodian's resistance to production is invalid, the maximum term of incarceration for such a contemnor is eighteen months. Indeed, the legislative history of Section 1826 reveals that it was specifically enacted to coerce compliance by a similar set of contemnors, namely immunized witnesses who refuse to testify. *See* S. Rep. No. 91-617, at 56 (1969). Like such immunized witnesses who cannot invoke their privilege against self-incrimination, corporate custodians did not cease being objects of Congressional concern simply because under *Braswell* they must comply.[7]

Ultimately, the most powerful refutation of the Second Circuit's logic comes from *Braswell* itself. *Braswell* cannot stand for the proposition that corporate custodians do not fall under Section 1826 because *Braswell was a Section 1826 case. See In re Grand Jury Proceedings*, 814 F.2d 190, 191 (5th Cir. 1987) (per curiam), *aff'd sub nom. Braswell v. United States*, 487 U.S. 99 (1988).

The Second Circuit's reasoning is flatly inconsistent with the decisions of the circuit courts cited above. In each of those cases, the contemnor was held to receive the protections of Section 1826 even though he was *not* a Fifth Amendment witness. Those contemnors were ordered to provide voice or

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[7] Since *Braswell*, this Court has indicated that the reason corporate custodians have no privilege against self-incrimination is not because they are not witnesses under the Fifth Amendment, but because they implicitly waive the privilege by assuming corporate employment. *See Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. 549, 558 (1990).

handwriting exemplars, the production of which is not deemed testimonial or communicative. *See In re Lopreato*, 511 F.2d 1150, 1153-54 & n.* (1st Cir. 1975) (handwriting exemplar); *In re Grand Jury Proceedings*, 567 F.2d 281, 282-83 (5th Cir. 1978) (voice exemplar); *United States v. Mitchell*, 556 F.2d 371, 384 (6th Cir. 1977) (voice exemplar); *Palmer v. United States*, 530 F.2d 787, 789 (8th Cir. 1976) (per curiam) (handwriting exemplar). Thus, the application of Section 1826 does not turn on whether a person is a witness under the Fifth Amendment.

2. The Second Circuit also held that the items Armstrong was ordered to produce did not qualify as "other information" under Section 1826 because they were objects of monetary value. App. 40a-41a. But that crabbed reading of the statute ignores the text and departs from the approach taken by this Court and the other circuits. In *Palmer v. United States*, the Eighth Circuit held that Congress intended Section 1826 to codify the entire range of testimonial obligations covered by current contempt practice. 530 F.2d at 789 (construing "other information" to be "comprehensive, including all information given as testimony, but not orally") (quoting H.R. Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4017); *see also* S. Rep. No. 91-617, at 148 (stating that Section 1826 was intended to codify the present contempt practice of the federal courts). This Court specifically approved *Palmer*'s approach. *See United States v. Euge*, 444 U.S. 707, 718 n.14 (1980).

One of the testimonial obligations of a witness historically has been to produce physical objects – such as gold bars or coins – because production may yield useful information or evidence. *See* 8 J.H. Wigmore, Evidence § 2194, at 76 (McNaughton rev. ed. 1961).[8] Indeed, the Federal Rules of Civil Procedure allow tangible things to be the subject of a pretrial

[8] Indeed, Wigmore discusses in the very same section the duty to disclose both the chattels that a person may own and the "corporal facts" on his body, such as the handwriting exemplars which *Palmer* held were subject to Section 1826. *See Euge*, 444 U.S. at 713 & n.7.

request for production as well as a subpoena *duces tecum*. Fed. R. Civ. P. 34(a)(1), 45(a)(1)(C). Failure to comply with either may result in contempt. *Id.* at 37(b)(2)(D), 45(e). It would be nonsensical (and would grossly violate the statutory language) to deny witnesses who refuse to comply with such orders the protections of Section 1826, despite the fact that the things sought may have monetary value.

3. The decision below also reasoned that the underlying purpose of the order to Armstrong was to restore property to its rightful owner rather than to gather evidence. App. 41a. As a factual matter, that purported distinction is false, as the proceeding in which the order was entered was "a proceeding before . . . any court," 28 U.S.C. § 1826(a), and from the moment of his incarceration seven years ago Armstrong has been facing criminal charges (and now criminal sentencing) for which the government has had every intention of using these items against him, *see* note 1 *supra*. In any event, based on the legislative history quoted above, there is ample reason to conclude that Congress intended to cap the term of incarceration of every contemnor who resists compulsion to provide evidence against himself, regardless of the form of the order. The decision below approves an end-run around that limitation. This Court's review is needed to clarify and reaffirm the proper application of Section 1826.

II. Whether An "Inherent" Judicial Power, Or The Federal Criminal Contempt Statute, 18 U.S.C. § 401(3), Authorizes Indefinite Imprisonment For Civil Contempt Is A Critical Question.

Although this Court has declared that the Non-Detention Act "proscrib[es] detention *of any kind* by the United States" absent congressional authorization, *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original), it has not resolved the precise degree of specificity and particularity of detention language that is required. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court divided evenly over the question whether an authorization of military force enacted after September 11

"clearly and unmistakably" granted the power to detain a U.S. citizen. This case squarely presents another question important to the administration of justice, and of greater everyday significance: whether federal district courts have inherent authority to incarcerate indefinitely for civil contempt.

Congress has carefully fashioned a framework of statutes to restrain and guide judicial exercise of the federal contempt power. Before a federal court may incarcerate a contemnor, Section 4001(a) demands that the court ground its authority in an act of Congress.[9] The only statute that contains the requisite clear and specific grant of authority to imprison civil contemnors is the Recalcitrant Witness Statute, which limits such imprisonments to eighteen months. The decision below radically

[9] Remarkably, the District Court held that Section 4001(a) does not apply to imprisonments imposed pursuant to a federal court's inherent, non-statutory civil contempt power. App. 63a n.7. The decision below strongly implied that it agreed, although it assumed *arguendo* that Section 4001(a) applied. App. 29a n.2. Excluding civil contempt incarcerations from Section 4001(a) disregards the Non-Detention Act's plain language, and flies in the face of this Court's contrary pronouncement in *Howe*, 452 U.S. at 479 n.3, and the determination of every other tribunal that has addressed this issue that Section 4001(a) extends without exception to all detentions. *See, e.g.*, *Padilla v. Rumsfeld*, 352 F.3d 695, 699, 720 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004); *Lono v. Fenton*, 581 F.2d 645, 648 (7th Cir. 1978) (en banc); *Padilla v. Hanft*, 389 F. Supp. 2d 678, 688 (D.S.C. 2005); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 597 (S.D.N.Y. 2002). Moreover, the Second Circuit's tacit endorsement of the argument that Congress never intended for the Non-Detention Act to apply to a federal court's inherent power to jail civil contemnors rests on nothing more than ambiguous statements by two legislators during congressional floor debates on Section 4001(a) that are an inherently unreliable source of legislative intent. *See* William N. Eskridge, *et al.*, *Legislative and Statutory Interpretation* 304 (2002). That view is also contradicted by the floor debate remarks of Rep. Robert Kastenmeier, an original sponsor of Section 4001(a), who correctly recognized that only *statutory* civil contempt authority, *i.e.*, Section 1826 – but not *inherent* civil contempt authority – would survive Section 4001(a)'s enactment. App. 29a n.2 (citing 117 Cong. Rec. 31534, 31541 (Sept. 13, 1971)).

expands that power, and thereby does violence to Congress' scheme, by enabling federal district courts to exercise an inherent – and unlimited – detention authority in a variety of settings where it would otherwise not be available.[10] Moreover, the court's alternate holding that the federal *criminal* contempt provision, 18 U.S.C. § 401(3), provides authority for indefinite detention of *civil* contemnors, misconstrues that statute.

1. The Second Circuit concluded that the federal courts' inherent, *non-statutory* power to impose indefinite coercive civil confinement passes muster under the Non-Detention Act's *statutory* authorization requirement. It reasoned that the Judiciary Act of 1789 instilled within the lower federal courts the "judicial Power of the United States," as authorized by Article III of the Constitution, which included inherent authority to employ coercive incarceration. App. 27a. It acknowledged, as it had to, that these inherent powers "do not draw from any specific grant of statutory authority" and "are not explicitly authorized by statute." *Id.* at 26a, 29a. Nonetheless, it concluded that the absence of statutory authority "does not render the existence of such powers any less an incident of legislative grace." *Id.* at 29a.

The Second Circuit's statements are telling for what they do not, and cannot, say. Under the Non-Detention Act, neither "legislative grace" nor any implied grant of authority suffices to imprison American citizens; only a precise and specific grant of congressional authority will do. Whatever inherent detention

[10] The decision below's expansion of inherent judicial power already has served as a precedent for the Second Circuit to disregard the elimination of other judicial authority in the context of immigration law, a subject over which this Court has repeatedly emphasized that Congress' legislative authority is at its zenith. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977). In *Lin v. United States*, 473 F.3d 48, 52-53 (2d Cir. 2007) (per curiam), the Second Circuit, relying on the decision below, concluded that even though Congress had affirmatively *repealed* the only statute that permitted the court to remand deportation cases to a federal immigration agency for consideration of new evidence, that repeal did not necessarily eliminate the court's "inherent equitable power" to do the very same thing. While purporting not to decide the question of its own power, the Second Circuit simply went ahead and remanded anyway.

power the lower federal courts may have been able to invoke in the exercise of their civil contempt authority prior to Section 4001(a)'s enactment, that inherent authority – even one "of ancient and traditional origins," App. 23a – was extinguished and is now regulated by the Non-Detention Act. *See Continental Cas. Co. v. United States*, 314 U.S. 527, 533 (1942); *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1874). The Second Circuit's refusal to accept the abrogation of the inferior courts' inherent power to incarcerate civil contemnors by Congress' clear and valid direction in Section 4001(a) prohibiting *all* non-statutory detentions raises an important issue of federal law that must be resolved by this Court.[11]

2. As an alternate ground, the Second Circuit held that the federal criminal contempt statute, 18 U.S.C. § 401(3), satisfies Section 4001(a)'s statutory authorization requirement to impose indefinite imprisonment for civil contempt. App. 30a. Section 401(3) empowers a federal court to sanction by "imprisonment" a contemnor's "[d]isobedience or resistance" to its lawful orders, but only for a specifically designated purpose: "to punish." The Second Circuit determined that Section 401(3)'s use of the word "punish," as construed by courts and commentators in its predecessor statutes, authorizes confinement for both civil and criminal contempt, even though civil contempt must always be coercive and never for punishment.

This Court has never decided whether Section 401(3) applies to civil contempt, let alone whether it authorizes

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[11] Inherent judicial power is displaced where "a statute in so many words, or by . . . [a] necessary and inescapable inference, restricts the court's [authority] in equity." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Congress' withdrawal of the lower federal courts' inherent power to imprison civil contemnors is necessarily and inescapably evidenced by the Non-Detention Act's affirmative prohibition against *all* non-statutory detentions. Congress could not have spoken in clearer terms. *Cf. TVA v. Hill*, 437 U.S. 153, 173 (1978); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (analyzing *Hill*).

indefinite civil confinements with the precision and clarity required by the Non-Detention Act. Decisions by the lower federal courts reflect uncertainty as to whether Section 401(3) applies to civil contempt or is limited only to criminal contempt.[12] The commentators, however, have raised compelling challenges to the view that Section 401(3) codifies a civil power of coercive confinement based on a variety of historical evidence. *See generally The Coercive Function Of Civil Contempt*, 33 U. Chi. L. Rev. 120, 120 n.3 (1965); *Civil and Criminal Contempt In The Federal Courts*, 57 Yale L.J. 83, 84 n.6 (1947-48); Recent Case, 54 Harv. L. Rev. 137, 137-38 (1940).

First, to construe the term "punish" in Section 401(3) as referring to civil contempt runs contrary to repeated references to "punishment" and "punishable" in the criminal provisions of the Judiciary Act of 1789, Section 401(3)'s original predecessor. *See* Judiciary Act § 9 (district courts have exclusive cognizance of "all crimes and offences" "where no other punishment than whipping," "a fine," or a "term of imprisonment" less than six months is to be inflicted); *id.* § 29 (referencing trial venue "in cases punishable by death"); *id.* § 33 (addressing availability of bail in criminal cases "except

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[12] This Court has previously assumed, but not decided, that Section 401(3) or one of its statutory ancestors apply to civil contempt. *See Penfield Co. of Ca. v. SEC*, 330 U.S. 585, 594 (1947). The concurrence in *Penfield* noted that other jurists have disagreed with that assumption. *See id.* at 598 n.11 (Rutledge, J., concurring) (citing *In re Sixth & Wisconsin Tower, Inc.*, 108 F.2d 538, 545 (7th Cir. 1939) (Evans, J., concurring in part) (holding that "Congress had in mind, and was speaking only of, criminal contempt" in the predecessor statute to Section 401(3)). The commentators, too, have observed that *Penfield* did not settle the question. *See, e.g., Civil and Criminal Contempt In the Federal Courts*, 57 Yale L.J. 83, 84 (1947-48) (noting that whether the federal contempt legislation now codified in Section 401 applies to civil contempt is still an "open question" after *Penfield*). While many lower courts have assumed without analysis that Section 401(3) does apply to civil contempt, others have recognized correctly that the matter is unresolved. *See In re Reed*, 11 B.R. 258, 263 n.5 (Bkrtcy D. Utah 1981).

where the punishment may be death" and for "an offence not punishable with death").[13] By contrast, Section 33 of the Judiciary Act grants civil contempt authority to compel witness examination in criminal cases "on pain of imprisonment," without using the word "punish" or a derivative thereof. Accordingly, the Judiciary Act's consistent use of "punish" in referring to criminal matters, and its omission of the word in conferring civil contempt authority, is persuasive evidence that the grant of authority in Section 17 of the Judiciary Act, now codified at Section 401(3), "to punish" contempt by "imprisonment," was limited to criminal contempt.

Second, the legislative history behind Congress' statutory regulation of the contempt power shows that the term "punish" in Section 401(3) speaks only to criminal contempt. Section 1 of the Act of March 2, 1831, which was the next legislative successor to the Judiciary Act, was passed in reaction to an infamous incident involving misuse of a federal court's criminal contempt power. *See generally* Allen Gardner Kingman, *Indefinite Confinement As A Coercive Measure By Courts*, 77 Regent U. L. Rev. 77, 99 (1991) (describing Judge Peck's imprisonment of an attorney who had criticized the judge's handling of a case). Hence, there is every reason to believe that Congress' use of the word "punish" was addressed only to criminal contempt. *See* Berj H. Seron, *Contempt – Construction of Statutes Limiting Power To Punish for Contempt*, 19 B.U. L. Rev. 668, 672 (1939).

In any event, even if Section 401(3) was intended to authorize coercive civil confinement, its grant of authority did

[13] The words "punish" or "punishment" also are used repeatedly in the Constitution to refer to crimes or sanctions for past misconduct. *See* U.S. Const., art. I, §§ 3, 5 (using "Punishment" and "punish," respectively, in addressing disciplining members of Congress); *id.* art. I, § 8 (empowering Congress to enact laws "[t]o provide for the Punishment of counterfeiting" U.S. currency and securities, and "[t]o define and punish Piracies and Felonies committed on the high seas"); *id.* art. III, § 3 ("Congress shall have the power to declare the Punishment of Treason").

not survive the passage of the Non-Detention Act in 1971. Section 401(3) is devoid of precise and specific language authorizing incarceration for *coercive, non-punitive* purposes. The Second Circuit's contention that the meaning of "punish" in Section 401(3) includes civil contempt authority is predicated *not* on the language of the statute but on inapposite language selectively plucked from pre-Section 4001(a) cases, none of which ever analyzed or decided Section 401(3)'s applicability to civil contempt. The proper test is whether the statute *on its face* clearly and specifically authorizes coercive civil confinement. Indeed, the Second Circuit's resort to caselaw to construe Section 401(3)'s use of the word "punish" only demonstrates that "punish" is, at the very least, ambiguous and thus insufficient to satisfy Section 4001(a). *Cf. United States v. United Mine Workers*, 330 U.S. 258, 298 n.64 (1947) ("'[P]unishment' as used in contempt cases is ambiguous."). In any event, nothing in Section 401(3) even comes close to authorizing the extraordinary sanction of *indefinite* confinement for civil contempt. *See In re Michael*, 326 U.S. 224, 227 (1945) (holding that predecessor statute to Section 401(3) reveals a Congressional intent to limit courts to "the least possible power adequate to the end proposed") (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)).

In sum, the decision below vitiates the Non-Detention Act by interpreting Section 401(3) as a license to jail civil contemnors for life, even though it was not intended to apply to civil contempt and lacks clear statutory language authorizing indefinite coercive confinement. The decision below thus poses an important issue of federal law requiring resolution by this Court.[14]

[14] Section 4001(a)'s abrogation of inherent judicial power to jail civil contemnors did not leave the lower federal courts powerless to impose coercive civil confinements. Section 1826, which codified civil contempt practice in federal courts, *see In re Kitchen*, 706 F.2d 1266, 1271 (2d Cir. 1983), was enacted nearly a year before Section 4001(a). By eliminating inherent detention power and making Section 1826 the sole legal basis for coercive civil detention, Section 4001(a) only modestly curtailed the maximum duration of imprisonment for civil

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III. Whether the Due Process Clause Imposes Any Limits on the Length of a Term of Incarceration for Civil Contempt is a Question of Critical Importance.

In rejecting Armstrong's challenge to his now more than seven-year term of incarceration, the Second Circuit held that the Due Process Clause places *no limits* on the ultimate duration of his detention. Thus, the decision below on its face permits Armstrong's incarceration for the rest of his life. On this point, Judge Sotomayor's concurrence broke ranks with the majority. The ruling flies in the face of this Court's and the other circuits' decisions recognizing, and enforcing, specific limits designed to avoid "unconscionable [and] indeterminate periods of confinement." *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 427 (3d Cir. 1979).

The courts have recognized two principles that limit the ultimate length of a term of incarceration for civil contempt: (1) the rule that after some period of confinement, the contemnor's claim of inability to comply must be credited; and (2) the rule that the contemnor must be released when there is a substantial likelihood that he will never comply.[15] The decision

(Cont'd)
contempt to eighteen months to curb potential abuse of unbridled judicial contempt power – such as jailing a contemnor like Armstrong for more than seven years for not relinquishing property despite his insistence that he does not have it. *See In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 427 (3d Cir. 1979). Moreover, numerous other contempt statutes authorize incarceration, *see, e.g.*, 18 U.S.C. §§ 1073, 3148(c); 21 U.S.C. § 969; 31 U.S.C. § 5318(e)(4), and courts retain inherent power to take measures such as levying fines and sanctions, or shifting attorneys' fees, which provide the judiciary with ample authority to safeguard the administration of justice.

[15] Both of these rules should apply to Armstrong's case. Armstrong initially contended that he could not comply, and indeed put on evidence of that fact. Several years into his detention, he also began stating that he would not comply even if he could do so. The second rule set forth above provides that even if the contemnor refuses to comply – or,

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below eliminated both of those important constraints on the exercise of the contempt power. This Court's review is urgently needed to clarify the critical question of whether the Due Process Clause imposes any limits on the length of a term of civil, coercive incarceration.

A. The Second Circuit Disregarded This Court's Ruling that a Claim of Inability to Comply Must be Credited After Some Period of Confinement.

It is axiomatic that civil confinement is designed solely to coerce compliance with a judicial command, rather than to punish for failure to comply. Accordingly, the distinguishing feature of civil as opposed to criminal contempt is that the contemnor is able to purge the contempt by performing the obligatory act, so that it can be said he "'carries the keys of his prison in his own pocket.'" *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994) (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911) (further quotation omitted)). To justify continued incarceration, it is essential that a contemnor retains at all times the ability to comply. If at any point he comes to lack it, for whatever reason, the contempt sanction becomes punitive and it must be dissolved. *See Shillitani v. United States*, 384 U.S. 364, 371 (1966).

In *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948), this Court held that "[i]t is everywhere admitted that even if [the contemnor] is

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equivalently, if the court does not believe his protestations that he cannot comply – there is still an ultimate limit on the permissible length of his incarceration. Armstrong seeks the benefit of that rule because the District Court found that he was willfully refusing to comply. The Second Circuit recognized, however, that Armstrong has continued to make both arguments: that he cannot comply, *see* App. 47a ("a contemnor who . . . claims, like Armstrong, to be incapable of complying with the court's order"), and that he will not comply, *see id.* at 12a ("[Armstrong] has refused to comply with the district court's orders . . . ."). Armstrong is entitled to relief under both principles.

committed, he will not be held in jail forever if he does not comply," because "[h]is denial of possession is given credit after demonstration that a period in prison does not produce the goods." *Accord Oriel v. Russell*, 278 U.S. 358, 366 (1929). The Third Circuit has explained *Maggio* to mean that after some period of incarceration, the inference that the contemnor is incapable of complying with the order becomes "overwhelming." *Chadwick v. Janecka*, 312 F.3d 597, 612 (3d Cir. 2002) (Alito, J.), *cert. denied*, 538 U.S. 1000 (2003). In simple terms, *Maggio* holds that it strains credulity to suppose that a contemnor voluntarily would spend many months in prison if he had the ability to comply and be released. The extended detention itself supplies the proof that the contemnor is unable to comply.

The Second Circuit attempted to distinguish *Maggio* by interpreting it as merely allowing, rather than requiring, an inference of an inability to comply. App. 44a. It further held that the large value of the assets at issue might create a special incentive for Armstrong to try to outlast the sanction in the hope of eventually keeping the property. *Id.* at 43a. But that attempted distinction is contrary to the words of *Maggio* itself, which stated that it is "everywhere admitted" that a term of civil incarceration must eventually come to an end. 333 U.S. at 76. Moreover, the value of the property is far too simplistic a basis for assigning to different contemnors varying maximum terms of coercive confinement. Even if the property's value deserved consideration, it should not have been considered in isolation, but only as one possible factor among many. *See* App. 53a (Sotomayor, J., concurring).[16] The decision below, however, gave

[16] Neither the Second Circuit nor the District Court made any effort to compare that sum to the rest of Armstrong's assets to determine whether it really would have motivated him to endure so prolonged an incarceration. Nor did they analyze in any systematic way Armstrong's motives to prefer his freedom. Basing an extended imprisonment on such speculative guesswork offends the Due Process Clause.

no weight to *Maggio*'s inference of an inability to comply based on the extraordinary length of Armstrong's detention.

One of the most important functions of *Maggio*'s rule is that it lessens the likelihood, and the gravity, of errors committed by the judge in determining whether the contemnor should be sanctioned in the first place and whether he can comply with the order. This Court has recognized that the judge does not act as a neutral factfinder when he adjudicates a contempt. *See International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 834 (1994) (citing *Green v. United States*, 356 U.S. 165, 214-15 (1958)). Not only does contumacy "'often strike[] at the most vulnerable and human qualities of a judge's temperament,'" *id.* at 831 (quoting *Bloom v. Illinois*, 391 U.S. 194, 202 (1968)), but the manner in which it combines the powers to identify, prosecute, adjudicate, and punish contumacious conduct "'summons forth . . . the prospect of "the most tyrannical licentiousness."'" *Id.* (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring in judgment) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228 (1821))).

Thus, there is a great risk that the judge may erroneously fail to credit the contemnor's professed inability to comply. *See generally* Earl C. Dudley, Jr., *Getting Beyond the Civil/ Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 Va. L. Rev. 1025, 1063 (1993) (explaining that unreliable fact-finding undermines the rationale given to civil contempt that the contemnor carries in his pocket the keys to his release). The Second Circuit itself acknowledged the possibility that Armstrong could lack the ability to comply but be unable to prove it. App. 43a n.8 (citing Dudley, *supra*, at 1063). Nevertheless, it reasoned that this concern should not be troubling because Armstrong had never made "a serious effort" to demonstrate that compliance was impossible. *Id.* Besides

being factually untrue,[17] that reasoning eviscerates *Maggio*. *Maggio*'s inference comes into play precisely in situations where the contemnor cannot otherwise prove his inability to comply. To hold that Armstrong does not deserve the benefit of *Maggio* because he has not introduced sufficient evidence of his inability to comply is circular.[18]

B. The Circuits are in Sharp Conflict as to Whether Due Process Requires the Release of a Contemnor Who Has Demonstrated a "Substantial Likelihood" that He Will Not Comply.

The decision below rejected a second, crucial limitation on the contempt power recognized by a number of circuit courts and many state courts as well. These courts have held that there

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[17] Armstrong contested his ability to comply. One of the principal unfairnesses of civil contempt, however, is that the burden is placed on the contemnor to prove a negative. By contrast, the petitioner in *Maggio* was released even though he "ma[de] no explanation as to the whereabouts or disposition of the property [in that case] which the order, earlier affirmed, declared him to possess." 333 U.S. at 70.

[18] There is another, deeper reason for *Maggio*'s inference of an inability to comply, which the Second Circuit also disregarded. The fact that a person possessed property at one time does not support indefinitely the inference that he has it at a later time; the presumption of continued possession "grows weaker as time passes, until it finally ceases to exist." *Marin v. Ellis*, 15 F.2d 321, 321 (8th Cir. 1926) (no inference of continued possession after 28 months); *accord Brune v. Fraidin*, 149 F.2d 325, 327-28 (4th Cir. 1945) (no inference after 36 months). *Maggio* cited both *Marin* and *Brune* in support of the proposition that turnover orders should not be issued based merely on proof that property was previously in the possession or control of the ordered party, unless the circumstances particularly sustain such an inference. 333 U.S. at 65-66 & n.2. Here, for much of the property at issue, there was a marked passage of time between Armstrong's last proven act of possession and issuance of the turnover order, and then another seven years beyond that. The Second Circuit, however, did not even consider – much less find – any circumstances that supported an inference of Armstrong's continued possession of this property.

comes a time during a period of civil incarceration when it is sufficiently clear that further imprisonment will not induce the contemnor to comply. When that threshold is crossed, the sanction becomes punitive and the contemnor must be released. Some courts have held that the tipping point may occur as early as six months into the incarceration. *See, e.g., In re Papadakis*, 613 F. Supp. 109 (S.D.N.Y. 1985). The concurrence below, relying on the legislative history of the Recalcitrant Witness Statute, advocated a presumption that it comes after eighteen months. App. 50a-51a (Sotomayor, J., concurring). This Court has never spoken to the issue, which potentially affects every person adjudged in civil contempt in state and federal court.

The Third, Seventh, Ninth, and Eleventh Circuits have recognized that civil incarceration must end when there is a "substantial likelihood" that the contemnor will never comply. *See, e.g., In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 424-25 (3d Cir. 1979); *United States v. Lippitt*, 180 F.3d 873, 877-78 (7th Cir. 1999); *Lambert v. Montana*, 545 F.2d 87, 89-90 (9th Cir. 1976); *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1530-31 (11th Cir. 1992); *see also Catena v. Seidl*, 65 N.J. 257, 262-63 (1974). The Second Circuit itself previously endorsed this rule, *see Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983), and the Fourth Circuit has also cited it in an unpublished decision. *United States v. Whitehorn*, No. 86-5574, 1986 WL 16245, at *1 (4th Cir. Dec. 12, 1986) (per curiam) (following *Simkin*). The rationale of these decisions is that once it becomes clear that compliance is not forthcoming, the incarceration no longer bears a reasonable relationship to the coercive purpose for which the contemnor was initially committed, and due process requires his release. *See Lambert*, 545 F.2d at 89-90 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972), and *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972)). As Judge Posner has explained the principle:

> Putting a person in prison for up to 18 months[19] . . . , without a full trial, and with none of the safeguards of the criminal process, is an anomaly in our system, and is permitted only when the purpose is not to punish for past miscreancy but to induce a specific act that the law has a right to coerce, in this case testifying before the grand jury. As soon as it is clear that the inducement won't work, the purpose of civil contempt lapses, and the continued imprisonment of the man becomes penal, and requires a criminal proceeding.

In re Crededio, 759 F.2d 589, 594 (7th Cir. 1985) (citations omitted; footnote added) (Posner, J., dissenting).

On the other hand, recently the Third Circuit in dictum, and now the Second Circuit in the decision below, have stated that there is *no* limit to the length of time that a civil contemnor can be incarcerated. Relying on this Court's definition of civil contempt as a sanction that may involve "confining a contemnor *indefinitely* until he complies," the Third Circuit reasoned that there is no due process limit on the potential length of civil incarceration. *See Chadwick v. Janecka*, 312 F.3d 597, 613 (3d Cir. 2002) (Alito, J.) (emphasis in original) (quoting *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994)), *cert. denied*, 538 U.S. 1000 (2003). The Second Circuit, in turn, cited both *Bagwell* and *Chadwick* for the proposition that civil confinement could last forever for a contemnor who refuses to comply. App. 42a, 44a n.9. As an additional basis for its conclusion, the majority reasoned that if there were any limit on the length of a contemnor's sanction, it would give the contemnor a "powerful incentive" to resist the

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[19] Like many of the cases cited above, *In re Crededio,* 759 F.2d 589, 594 (7th Cir. 1985) dealt with the question whether a Section 1826 contemnor can show that there is no substantial likelihood of compliance *before* the maximum eighteen-month term of confinement has expired.

court's order based on the hope that "simple resistance will result in [his] freedom." *Id.* at 44a n.9.[20]

The single statement from *Bagwell*, however, is not persuasive authority for these courts' conclusions. The issue in *Bagwell* was whether certain determinate, non-compensatory fines imposed on a labor union for violating an injunction were civil or criminal contempt sanctions. Before reaching that specific question, the Court went over the familiar ground of defining the paradigmatic sanction of civil contempt as one that "confin[es] a contemnor indefinitely until he complies with an affirmative command . . ." *Bagwell,* 512 U.S. at 828 (citing *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 442 (1911)). The *Bagwell* Court was simply describing the *structure* of the sanction itself, as opposed to the subjective intent of the court that imposed it, and distinguishing an indefinite term of confinement from one with an end-point fixed in advance. That distinction has been commonplace since long before *Gompers* was decided in 1911. But that issue has nothing to do with the question of whether there are constitutional limits on how long a term a contemnor may be required actually to serve. Indeed, the courts that have recognized that a civil incarceration must end – once it is clear that there is a substantial likelihood that the contemnor will not comply – were referring explicitly to sanctions structured to last indefinitely until compliances occurs. *See, e.g., In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 425 n.14 (3d Cir. 1979).

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[20] There is no question that the decision below was rejecting the rule that civil incarceration must end when compliance is no longer a realistic possibility. The panel stated explicitly that "[t]he Due Process Clause does not demand that the test of [Armstrong's] obduracy end today or, for that matter, at any specific time." App. 47a. Furthermore, the court at least four times explained that Armstrong's only possibility of winning his release was to show his inability to comply, without once mentioning any other limiting principle. *Id.* at 19a, 22a, 42a, 47a. Indeed, the only matter that the court instructed the district court to consider at the upcoming contempt hearing was whether Armstrong was presently capable of complying. *Id.* at 48a.

The Second Circuit's additional reason misses the point as well. Even if it were true that a time-limit on a term of civil confinement would provide some incentive for a contemnor to wait in the hope that he might outlast the sanction, the other circuits' rule requires release only after the court has first found that the contemnor will not be dissuaded by his confinement, regardless of its length. Indeed, the whole point of that rule is that precisely because the contemnor refuses to comply – and even the prospect of an indefinite term of imprisonment will not cause him to change his mind – the character of his sanction automatically becomes punitive. The Second Circuit's reasoning necessarily implies a complete rejection of that rule.

These courts are thus in sharp, irreconcilable conflict. According to the Third, Seventh, Ninth, and Eleventh Circuits, there is a substantial argument within the first *eighteen months* that due process requires the contemnor's release because he has demonstrated his refusal to comply. By contrast, the decision below holds that there is *no* point – even after nearly *seven years* – when that confinement must end, even if there is no likelihood that it will ever be effective.[21] This Court's review is needed to resolve this critical conflict.

[21] In a further split from the other circuits, the panel reasoned that Armstrong's incarceration would become *more* coercive, rather than more punitive, after his appeals and petitions were put to rest. App. 9a (quoting *CFTC v. Armstrong*, 284 F.3d 404, 406 (2d Cir. 2002) (per curiam)). It thus set up, quite unapologetically, a perfect Catch-22 for Armstrong. The longer he complains about his confinement, the more the Second Circuit apparently views it as a sign that the sanctions are proving effective. The only way to show their inefficacy, paradoxically, is not to challenge them at all. Tellingly, the District Court made much the same prediction, erroneously, in 2001, after denial of Armstrong's first appeal. App. 88a ("I am persuaded that he is just now starting to feel some effects of his continued confinement.").

IV. Neither The New Contempt Hearing Scheduled by the District Court Nor Armstrong's Impending Criminal Sentencing Would Moot This Petition.

Armstrong faces two upcoming proceedings in the district courts. On April 4, 2007, the district judge to whom the Second Circuit ordered the civil enforcement actions reassigned will convene a new hearing on Armstrong's asserted inability to comply with the turnover order. On April 10, 2007, Armstrong will be sentenced for his criminal conviction, for which he faces a statutory maximum of five years' imprisonment. Regardless of the sentencing, if Armstrong's civil incarceration continues, this appeal would remain live.

Indeed, even vacating the contempt order would not moot this petition because reversal by this Court would affect the extent of any further imprisonment. A contemnor any part of whose civil incarceration is determined to be invalid is entitled to credit against any pending criminal sentence. *See United States v. Mitchell*, 556 F.2d 371, 385 (6th Cir. 1977) (ruling that defendants were improperly incarcerated beyond eighteen months for their civil contempts under 28 U.S.C. § 1826 and ordering the excess time credited against their pending criminal sentences) (cited on this point in the decision below, App. 40a n.6); *In re Grand Jury Proceedings*, 541 F.2d 464 (5th Cir. 1976) (per curiam) (holding that civil contemnor held beyond expiration of grand jury would receive credit even against *unrelated* criminal sentence). A determination that any portion of Armstrong's seven-year contempt sanction was improper and therefore punitive would entitle him to claim credit, enforceable through 28 U.S.C. § 2241, for that time against the undischarged criminal sentence he was then serving.

Accordingly, neither the sentencing nor the new contempt hearing should convince this Court not to grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

March 19, 2007

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED NOVEMBER 27, 2006

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 04-5448-PR(L), 05-0280-PR(CON).

Martin A. ARMSTRONG,

Petitioner-Appellant,

v.

Joseph R. GUCCIONE, United States Marshal for the Southern District of New York, and Marvin D. Morrison, Warden, Metropolitan Correctional Center,

Respondents-Appellees,

Alan M. Cohen,

Intervenor Receiver-Appellee.

Argued: Jan. 24, 2006.
Decided: Nov. 27, 2006.

Before: WALKER, LEVAL and SOTOMAYOR, Circuit Judges.

Judge SOTOMAYOR concurs in a separate opinion.

JOHN M. WALKER, JR., Circuit Judge.

Appendix A

It has been said that a civil contemnor who is incarcerated to compel compliance with a court order holds the key to his prison cell: Where defiance leads to the contemnor's incarceration, compliance is his salvation. In this case, petitioner-appellant Martin A. Armstrong principally argues that the key to his freedom comes at the cost of his Fifth Amendment right against compelled self-incrimination.

Armstrong, a corporate officer, refuses to fully comply with valid turnover orders, under which he has been compelled to return to a court-appointed receiver corporate records and assets totaling approximately $16 million. The United States District Court for the Southern District of New York (Richard Owen, *Judge*) held Armstrong in civil contempt based on his noncompliance and ordered his detention at the Metropolitan Correctional Center. Despite numerous hearings, at which the district court permitted Armstrong to either produce the missing records and assets or demonstrate that he is incapable of doing so, Armstrong continued to defy the court's directives and persisted in his assertion that, under the Fifth Amendment, he cannot be compelled to return corporate property. Armstrong eventually filed this application for a writ for habeas corpus, in which he raises numerous constitutional and statutory challenges to his confinement. He also moved for bail pending the resolution of this application. The district court issued two orders-the first denying Armstrong's bail motion and the second denying his application for habeas relief, *Armstrong v. Guccione,* 351 F.Supp.2d 167 (S.D.N.Y.2004)-both of which Armstrong now appeals.

Appendix A

The appeal presents several novel questions relating to a district court's inherent power, including whether, on the facts of this case, Congress intended to displace the district court's authority to order coercive civil confinement. We must now decide: (1) whether Armstrong's Fifth Amendment right against compelled self-incrimination protects him from being compelled by court order to produce corporate records and assets, which he holds as a custodian for the corporation; (2) whether Armstrong's detention for civil contempt violates (a) the Non-Detention Act, 18 U.S.C. § 4001(a), (b) the Recalcitrant Witness Statute, 28 U.S.C. § 1826, or (c) the Due Process Clause of the Fifth Amendment; and (3) whether the district court abused its discretion when it denied Armstrong's motion for bail pending the resolution of his habeas petition. Because we answer all of these questions in the negative, we affirm the orders of the district court.

BACKGROUND

On September 13, 1999, Armstrong was arrested on a complaint charging him with securities fraud. The complaint alleged that Armstrong had persuaded Japanese investors to entrust approximately $3 billion to various companies controlled by him-most prominently, Princeton Economics International, Ltd. and Princeton Global Management, Ltd. (the "Princeton companies"). The investments were made on the understanding that Armstrong would invest in United States securities on behalf of the Japanese investors while hedging against any exchange-rate risk inherent in the conversion between yen and dollars. Instead, Armstrong engaged in risky and speculative trading and, as a result, lost nearly $1 billion. To hide the losses, Armstrong schemed

with officers of Republic New York Securities Corporation to create fraudulent account statements and account-value confirmations that were presented to the Japanese investors. Over time, the investment program turned into a massive pyramid (Ponzi) scheme, in which Armstrong used the cash flow generated by new-investor money to pay off old investors and mask the massive investment losses.

Armstrong was charged in a twenty-four-count indictment with conspiracy to commit securities fraud, commodities fraud, and wire fraud in violation of 18 U.S.C. § 371; securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. § 2; and wire fraud in violation of 18 U.S.C. §§ 1341 and 2. In 2004, a superseding indictment was returned against Armstrong that expanded the scope of the previously charged conspiracy and added a count for money laundering in violation of 18 U.S.C. §§ 1957(a) and 2.

On the same day that Armstrong was arrested, September 13, 1999, the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") instituted civil proceedings against Armstrong and the Princeton companies. *SEC v. Princeton Econ. Int'l, Ltd.*, No. 99 Civ. 9667 (S.D.N.Y.); *CFTC v. Princeton Global Mgmt., Ltd.*, No. 99 Civ. 9669 (S.D.N.Y.). The SEC and the CFTC immediately moved for a temporary restraining order, through which they sought to restrain Armstrong from further violating the securities laws, freeze the Princeton companies' assets, appoint a receiver to collect these assets on behalf of the companies, and require that "Armstrong and the Corporate Defendants and their officers, directors, agents,

servants, employees, and attorneys-in-fact" turn over to the court-appointed receiver all corporate books, records, and "assets of the Corporate Defendants [that the defendants had] in their current possession, custody or control." The district court (Lewis A. Kaplan, *Judge*) granted the motions. On October 14, 1999, the district court (Richard Owen, *Judge*) granted the SEC's, the CFTC's, and the court-appointed receiver's motions for a preliminary injunction, which substantially continued the temporary restraining order.

Pursuant to the district court's orders, the court-appointed receiver, Alan M. Cohen, demanded that Armstrong return misappropriated corporate records and assets, including several corporate computers and approximately $16 million worth of rare coins, gold bullion bars and coins, and various antiquities. Armstrong refused to produce the misappropriated items or answer any questions concerning their whereabouts, asserting that forcing him to turn over corporate records and assets would violate his Fifth Amendment right against compelled self-incrimination.

On December 15, 1999, the receiver moved for an order holding Armstrong in contempt for refusing to give up the corporate records and assets still in his possession. The district court held a hearing on the receiver's motion on January 7, 2000. At the hearing, the receiver produced evidence in the form of declarations, invoices, shipping documents, bank records, and wire-transfer authorization letters that established that Armstrong had purchased the computers, coins, gold, and antiquities with corporate funds, and that these items were delivered to Armstrong. Armstrong did not offer any evidence in response; instead, he reiterated

through counsel his argument that compliance with the court's orders would violate his Fifth Amendment right against compelled self-incrimination. At the conclusion of the hearing, the district court ruled that the Fifth Amendment did not bar the compelled production of the corporate records and assets. The district court also found, based on the evidence, that Armstrong had taken possession of, and continued to control, the corporate records and assets sought by the receiver. The district court directed Armstrong to produce the missing property. Because Armstrong's counsel represented that his client would "comply and turn over whatever he has in his possession," however, the district court held open the contempt proceedings and ordered production by January 14, 2000.

During the ensuing week, Armstrong produced approximately $1.1 million in rare coins, one computer with its hard drive conspicuously removed, three other computers, eight boxes of documents, and various antiquities, including six busts. Armstrong failed to produce a black Compaq computer, the missing computer hard drive, 102 gold bars, 699 gold bullion coins, a bust of Julius Caesar, and the remaining rare coins valued at $12.9 million. All told, Armstrong failed to return approximately $15 million in corporate assets.

On January 14, 2000, when the district court resumed proceedings, the receiver renewed his contempt motion and called several witnesses, who testified as to the missing records and assets. A forensic computer expert testified that (1) one of the four returned computers had its hard drive removed, (2) on the morning before another computer was

turned over to the receiver, more than 500 files had been erased from its hard drive, and (3) on the same day that a third computer was turned over, software was installed enabling the deletion of computer files and the computer's internal clock was reset in an effort to mask the destruction of files. A second witness, a coin dealer who sold many of the missing coins to Armstrong, testified that Armstrong had produced only $1.1 million of the approximately $14 million in rare coins owned by the corporate defendants. In addition, the receiver proffered that Armstrong had failed to return several boxes of corporate records and the missing gold bars, gold bullion coins, and antiquities, including a bust of Julius Caesar.

In response to the receiver's evidence, Armstrong testified on his own behalf, "limited to the issues of compliance," but presented scant evidence to corroborate that testimony. Of the items that he had returned, Armstrong testified that he had kept some of the items "hidden in a shed in the backyard" of his mother's house and had stored other items in her house. Armstrong also stated that he had kept corporate assets-mostly antiquities-at his office at Carnegie Center in New York. Of the missing items, Armstrong neither denied that he had taken possession of these items nor contested the fact that they were purchased with corporate assets. He testified, however, that he had given the missing-and somewhat illiquid-assets to former business associates in an effort to settle past debts. Armstrong produced no evidence documenting the existence of these debts or their settlement, and he did not call a single witness to corroborate his story. Instead, Armstrong submitted a declaration from a foreign national, Nigel Kirwan, in which Kirwan stated that

Armstrong agreed to pay Kirwan's trust $10 million in exchange for future revenues to be earned by a joint business venture. Kirwan did not state, however, that he actually took possession of $10 million in corporate assets from Armstrong, only that Armstrong had *agreed* to provide him with the money in the future.

At the conclusion of arguments, the district court found Armstrong in contempt for failing to turn over the missing records and assets. The court directed the marshals to confine Armstrong at the Metropolitan Correctional Center ("MCC") until he either complied with the turnover orders or demonstrated that it would be impossible for him to do so.

Since January 14, 2000, Armstrong has remained confined at the MCC. The district court has conducted periodic hearings to ensure that Armstrong's detention remains coercive rather than punitive. In furtherance of this end, the district court has provided Armstrong with numerous opportunities to either comply with the orders or demonstrate that it would be impossible for him to do so.

For his part, Armstrong has filed numerous interlocutory appeals from the district court's repeated determinations that his detention remains coercive. *See SEC v. Armstrong* ("*Armstrong IV*"), 88 Fed.Appx. 460 (2d Cir.2004) (per curiam) (non-precedential summary order) (dismissing the appeal for lack of appellate jurisdiction after finding that Armstrong's detention remains coercive); *CFTC v. Armstrong* ("*Armstrong III*"), 284 F.3d 404 (2d Cir.2002) (per curiam) (same), *cert. denied*, 537 U.S. 864, 123 S.Ct. 260, 154 L.Ed.2d 108 (2002); *SEC v. Princeton Econ. Int'l Ltd.*

("*Armstrong II*"), 7 Fed.Appx. 65 (2d Cir.2001) (per curiam) (non-precedential summary order) (same); *see also CFTC v. Armstrong* ("*Armstrong I*"), 269 F.3d 109 (2d Cir.2001). Each time, we held that we lacked jurisdiction over the non-final district court order and would continue to lack jurisdiction until that civil contempt order lost its coercive effect and became punitive in nature.

On February 26, 2004, in rejecting Armstrong's last interlocutory appeal on jurisdictional grounds, we invited Armstrong to submit a habeas petition as a means of having his constitutional and statutory claims addressed on the merits. *See Armstrong IV,* 88 Fed.Appx. at 462. "We base[d][our] decision, in part, on [the] belief that a ruling squarely addressing the merits of Armstrong's arguments [would] streamline the ultimate resolution of this case." *Id.* We also have stated our belief that Armstrong's incarceration will only become more coercive once his "various appeals and petitions for extraordinary relief" are finally put to rest. *Armstrong III,* 284 F.3d at 406.

On August 23, 2004, six months after we suggested that Armstrong seek collateral relief, Armstrong filed with the district court a petition for a writ of habeas corpus. Armstrong's petition sought relief on two principal grounds: that his continued detention for non-production of the missing records and assets violates his Fifth Amendment right against compelled self-incrimination, and that the district court lacks authority to incarcerate him for civil contempt.

On September 23, 2004, the district court held a conference to set a briefing schedule and a hearing date for

the petition. At the end of the conference, Armstrong sought bail pending the resolution of his habeas petition. The district court denied the motion.

On October 12, 2004, Armstrong appealed the denial of his motion for bail pending the district court's review of his habeas petition. That appeal is currently before us. Two days later, Armstrong separately moved this court for bail, which we denied in a December 7, 2004, order.

On December 23, 2004, the district court denied Armstrong's habeas petition. *Armstrong v. Guccione,* 351 F.Supp.2d 167 (S.D.N.Y.2004). It found that, under *Braswell v. United States,* 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988), Armstrong cannot assert a Fifth Amendment right against the compelled production of corporate records and assets. 351 F.Supp.2d at 173. The district court also rejected Armstrong's contention that it lacked the authority to keep him incarcerated as a civil contemnor. *Id.* at 171 & n. 7, 173.

On January 11, 2005, Armstrong filed a notice of appeal from the district court's December 23, 2004, decision. We consolidated this appeal with Armstrong's separate appeal from the district court's order denying bail.

On January 24, 2006, we heard oral argument in these appeals. Thereafter, on August 17, 2006, Armstrong pled guilty to conspiracy to commit securities, mail, and wire fraud and awaits sentencing. Armstrong's challenge to the lawfulness of his civil confinement, however, which stems from his refusal to comply with orders entered in the civil proceedings against his companies, remains before us.

Appendix A

DISCUSSION

The district court had subject matter jurisdiction over Armstrong's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. We have jurisdiction to entertain his appeal pursuant to 28 U.S.C. § 2253(a).

We review de novo the denial of an application for a writ of habeas corpus brought pursuant to § 2241. *See Rankine v. Reno,* 319 F.3d 93, 98 (2d Cir.2003). Our review of the denial of bail in a habeas corpus proceeding is deferential; we "must accord a presumption of correctness to the initial custody determination made" by the district court. *Hilton v. Braunskill,* 481 U.S. 770, 777, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987); *see also* Fed. R.App. P. 23(d) (stating that, in a habeas proceeding, the district court's initial bail determination will not be set aside absent "special reasons shown to the court of appeals").

Armstrong attacks his confinement on three fronts. First, Armstrong argues that his incarceration contravenes his Fifth Amendment right against compelled self-incrimination notwithstanding that he has been ordered to return corporate property. Second, he argues that his continued detention violates (a) the Non-Detention Act, (b) the Recalcitrant Witness Statute, and (c) the Due Process Clause of the Fifth Amendment. Finally, Armstrong argues that the district court abused its discretion by denying him bail pending the resolution of his habeas petition.

Appendix A

I. Compelled Self-Incrimination

Armstrong's principal contention all along-throughout his contempt hearings and supporting his habeas petition-has been that the forced production of corporate records and assets violates his Fifth Amendment right against compelled self-incrimination. He has refused to comply with the district court's orders, asserting instead his own understanding of the law: "My position is I don't have to [comply]." The law, however, is otherwise.

In *Braswell v. United States,* the Supreme Court held that a corporate custodian could not invoke the Fifth Amendment as a basis for refusing to produce corporate records, even though the act of producing those records has independent testimonial significance, which might incriminate the custodian personally. 487 U.S. 99, 109-10, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988). The Court reached this holding based, in part, on the collective entity rule, which provides that a collective entity is beyond the protection of the Fifth Amendment. *See, e.g., United States v. White,* 322 U.S. 694, 699, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944) (upholding an order of contempt against a union representative for refusing to produce union records because the official held the records in a representative capacity and the Fifth Amendment privilege applies only to natural persons). As the *Braswell* Court explained:

> [T]he custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. Artificial entities such as corporations may act only through their agents,

> and a custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation-which of course possesses no such privilege.

487 U.S. at 109-10, 108 S.Ct. 2284 (citation omitted).

Although a corporate custodian is not entitled to raise the Fifth Amendment as a shield to the production of corporate records and property, *Braswell* established a "mitigating evidentiary privilege" to reduce the risk that the custodian's act of production would be attributed to him personally. *Id.* at 117-18, 108 S.Ct. 2284. Thus, "in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by . . . the custodian." *Id.* at 118, 108 S.Ct. 2284.

Braswell controls here. The district court found that Armstrong is a corporate officer in possession of records and assets of the Princeton companies. Accordingly, he can be compelled to produce the companies' records and assets; he cannot escape production by relying on the Fifth Amendment.

Undeterred by what is a routine application of *Braswell,* Armstrong goes to considerable lengths to attempt to get out from under the decisive weight of its holding. Armstrong argues that *Braswell* does not apply post-indictment; that "[t]he reasoning of *Braswell* has been called into question by the Supreme Court's decision in" *United States v. Hubbell,* 530 U.S. 27, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000); and, finally, that his contempt order rests on error because the district court "misapplied *Braswell* to the facts in this case." None of these arguments has merit.

First, nothing in *Braswell* limits its application to unindicted corporate custodians. *Braswell* fully anticipated that the government might pursue criminal charges against the person claiming a Fifth Amendment privilege when it established the mitigating evidentiary privilege. *Braswell,* 487 U.S. at 117-18, 108 S.Ct. 2284. There is no basis to believe that the Court's assessment of a custodian's Fifth Amendment interests changes after that custodian is indicted. The Supreme Court's Fifth Amendment jurisprudence teaches that an individual's right against compelled self-incrimination, to the extent that he or she enjoys such a right, is equally pressing pre- and post-indictment. In any event, the decision in *Braswell* did not involve weighing the custodian's personal interests; it held that a custodian for a corporation "may not resist a subpoena for corporate records on Fifth Amendment grounds." *See id.* at 113, 108 S.Ct. 2284. The rule announced in *Braswell* applies with equal force before and after a custodian is indicted.

Second, we reject any suggestion that *Hubbell* so undermined *Braswell* that we are no longer compelled to

follow its holding. *Hubbell* recognized that the compelled production of documents can be testimonial to the extent that such production communicates a statement of fact-for example, that requested "papers existed, were in [the individual's] possession or control, and were authentic." *Hubbell,* 530 U.S. at 36, 120 S.Ct. 2037 (quotation marks omitted); *see also id.* at 41-42, 120 S.Ct. 2037. *Braswell* is not wholly inconsistent with *Hubbell. Braswell* recognized that a custodian's act of production on behalf of a corporation can be testimonial; it established an evidentiary privilege to prevent the government from using the custodian's act of production in a subsequent criminal proceeding against the custodian. *Braswell,* 487 U.S. at 117-18, 108 S.Ct. 2284. We remain bound by the Supreme Court's holding in *Braswell.*

Finally, we reject Armstrong's assertion that the district court misapplied *Braswell.* This assertion is based on two distinct arguments: that (a) Armstrong's case does not fit within *Braswell* because he is no longer a corporate custodian, and (b) in any event, the district court exceeded its authority under *Braswell* because, if Armstrong failed to comply with the turnover orders, he could avoid a finding of contempt only by demonstrating that compliance with the orders would prove impossible. Neither argument has merit.

Armstrong argues that he is no longer a custodian because, when the district court ordered the production of corporate records and assets, it also appointed a receiver, which, according to Armstrong, "stripped [Armstrong] of all authority over the Corporate Defendants." Armstrong thus argues that his case falls outside the rule announced in

Braswell. Instead, he argues that his status is more akin to that of a former employee. And he relies on *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999,* 191 F.3d 173 (2d Cir.1999), in which we held that former employees were no longer custodians of their former employer and thus could assert a Fifth Amendment privilege in response to subpoenas, which were served after the employees resigned from the company but sought to compel the production of corporate property that remained in the former employees' possession.

We have little difficulty concluding that, on the day that the turnover order was entered, Armstrong was an officer of the Princeton companies and a custodian of corporate property. The appointment of the receiver did not eliminate Armstrong's custodial duties and it did not sever his relationship with the companies. In fact, the district court specifically found that, "although Mr. Martin Armstrong . . . may not have the power that he had once upon a time, he is still a custodian and officer . . . of the various corporations that [own] this property." There is no basis for setting aside this finding. Armstrong's case is governed by *Braswell,* not *In re Three Grand Jury Subpoenas.*

We likewise reject Armstrong's argument that the district court exceeded its authority under *Braswell* when it recognized that, in order to set aside the contempt order, Armstrong bore the burden of demonstrating that compliance with the turnover orders would prove impossible. In pursuing this argument, Armstrong suggests that the district court held him in contempt for refusing to testify as to the whereabouts

of the missing corporate property. This suggestion distorts reality.

At the January 7, 2000, hearing, the district court determined that Armstrong could not assert a Fifth Amendment privilege against the compelled production of the missing corporate property. The district court, however, stayed the contempt proceedings and ordered production by January 14, 2000, because Armstrong's counsel indicated that his client would "comply and turn over whatever he has in his possession." In response, the district court warned that, in order to avoid a future finding of contempt at the January 14 hearing, Armstrong would have to either produce the missing property or demonstrate that compliance is impossible. *See* Appx. 493 (Jan. 7, 2000, hearing) ("I am observing now to Mr. Armstrong and his lawyers that *if there is nonproduction* of any of the items that have been listed by the court as having been demonstrated to be producible by him, *if there is nonproduction,* I'm going to want a competent explanation." (emphasis added)).

At the January 14, 2000, hearing, when Armstrong failed to produce all of the missing items, the district court found him in contempt for refusing to turn over the missing corporate property; the court did not find him in contempt based on any refusal to testify. *See* Appx. 668 (Jan. 14, 2000, hearing) ("Mr. Armstrong, I am finding you in civil contempt for failure to produce a lot of stuff."); *see also SEC v. Princeton Econ. Int'l, Ltd.*, 294 F.Supp.2d 550, 551 (S.D.N.Y.2003) ("Mr. Armstrong is being asked to turn over property, not to provide any testimony.").

Appendix A

The district court's statements and actions reflect a proper understanding of the law. Although Armstrong may not assert a Fifth Amendment privilege in response to the turnover orders, *Braswell,* 487 U.S. at 109-10, 108 S.Ct. 2284, he could have avoided a finding of contempt-and can still have the contempt order set aside-by demonstrating that compliance with the turnover orders is presently impossible, *see United States v. Rylander,* 460 U.S. 752, 757, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983). As the Supreme Court explained in *Rylander*:

> In a civil contempt proceeding . . . , a defendant may assert a *present* inability to comply with the order in question. *Maggio v. Zeitz,* 333 U.S. 56, 75-76, 68 S.Ct. 401, 92 L.Ed. 476 (1948). While the court [will not relitigate the basis upon which an] enforcement order [rests], it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising [the] defense [of impossibility], the defendant has a burden of production.

460 U.S. at 757, 103 S.Ct. 1548 (citation altered and citations omitted).

Although Armstrong has no Fifth Amendment right to refuse to produce the property, he does retain the right to refuse to testify as to the whereabouts of the missing corporate property. *Curcio v. United States,* 354 U.S. 118,

128, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957); *United States v. Edgerton,* 734 F.2d 913, 920 (2d Cir.1984). This testimonial privilege, however, does not relieve him of his burden to demonstrate a present inability to comply with the turnover orders. *Rylander,* 460 U.S. at 758, 103 S.Ct. 1548. Thus, the burden to demonstrate impossibility remains at all times on Armstrong, even though he cannot be compelled to take the witness stand at a compliance hearing.

The district court did not force Armstrong to take the witness stand; instead, the court recognized that if Armstrong failed to produce the missing items, he could avoid a finding of contempt only by demonstrating that compliance is impossible. *See* Appx. 493-94. Armstrong was subsequently held in contempt because he neither complied with the turnover orders nor demonstrated that such compliance is impossible. *See id.* at 668, 671; *see also Rylander,* 460 U.S. at 761, 103 S.Ct. 1548 ("Rylander is thus not compelled to submit to incarceration, or run the risk of incriminating himself; he is committed until he either produces the documents which the District Court found to be in his possession, or adduces evidence as to his present inability to comply with that order." (citation and internal quotation marks omitted)).

Lest there be any misunderstanding based on Armstrong's assertions, his self-incrimination arguments are without merit; the district court's contempt order does not rest on an erroneous application of the Fifth Amendment's Compelled Self-incrimination Clause.

Appendix A

II. Detention Authority

Armstrong argues that, even if he was lawfully held in contempt, the district court's authority to detain him expired long ago. Specifically, he claims that his continued confinement, now approaching seven years, violates the Non-Detention Act, the Recalcitrant Witness Statute, and the Due Process Clause of the Fifth Amendment.

In making these arguments, Armstrong acknowledges that district courts were formerly vested with certain inherent powers, including the power to order coercive civil confinement. Armstrong argues that the Non-Detention Act eliminated the power of the lower federal courts to incarcerate for civil contempt; that if that power survived, the Recalcitrant Witness Statute limited confinement to a maximum duration of eighteen months; and that in any event the duration of his confinement exceeds what is permissible under the Due Process Clause. Before we address these arguments, however, it is important to understand the baseline authority that the district court has invoked: an inherent authority to order coercive civil confinement.

The Supreme Court has long recognized that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution." *United States v. Hudson,* 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812). "The most prominent of these is the contempt sanction, which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court." *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764, 100 S.Ct. 2455, 65 L.Ed.2d 488

(1980) (quotation marks omitted); *see also In re Debs,* 158 U.S. 564, 595, 15 S.Ct. 900, 39 L.Ed. 1092 (1895), *abrogated on other grounds by Bloom v. Illinois,* 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968) (" 'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge.' " (quoting *Watson v. Williams,* 36 Miss. 331, 341 (Miss.Err. & App.1858))); *Sigety v. Abrams,* 632 F.2d 969, 976 (2d Cir.1980) (quoting the same). "The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." *Ex parte Robinson,* 86 U.S. (19 Wall.) 505, 510, 22 L.Ed. 205 (1874); *see also Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204, 227, 5 L.Ed. 242 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."); *NASCO, Inc. v. Calcasieu Television & Radio, Inc.,* 894 F.2d 696, 702 (5th Cir.1990), *aff'd sub nom., Chambers v. NASCO, Inc.,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

Modern courts distinguish between two forms of contempt: civil and criminal. *See, e.g., Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911) (the lead case analyzing the differences between the two kinds of contempt); *see also Int'l Union, United Mine Workers of Am. v. Bagwell,* 512 U.S. 821, 826-30, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (discussing the differences between the two forms of contempt).

Appendix A

> The chief characteristic of civil contempt is that its purpose is to compel obedience to an order of the court to enforce the rights of the other party to the action. Consistent with this remedial purpose, the sanction imposed is generally made contingent on compliance. This is often accomplished by a purgation provision, whereby a civil contemnor may purge himself of contempt at any time by compliance. The purpose of an order of criminal contempt, on the other hand, is punitive. It is imposed to vindicate the court's authority. Accordingly, compliance with the court's command will not lift the sanction.

In re Irving, 600 F.2d 1027, 1031 (2d Cir.1979) (citations omitted); *see also Simkin v. United States,* 715 F.2d 34, 36-37 (2d Cir.1983).

Thus, "[t]he paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance." *Bagwell,* 512 U.S. at 828, 114 S.Ct. 2552 (citation and quotation marks omitted). The phrase "indefinitely until he complies," however, is not quite as absolute as the use of the term "indefinitely" might suggest. A contemnor can, for example, secure his freedom, without complying, if he demonstrates that there is "no wilful disobedience but only an incapacity to comply." *Maggio,* 333 U.S. at 74, 68 S.Ct. 401; *see also Rylander,* 460 U.S. at 757, 761, 103 S.Ct. 1548.

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In *Shillitani v. United States,* the Supreme Court stated: "There can be no question that courts have inherent power to enforce compliance with their lawful order through civil contempt." 384 U.S. 364, 370, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *cf. Sigety,* 632 F.2d at 976 (quoting the same in support of a state court's authority to confine for civil contempt). Thus, we have little difficulty concluding that the district court's inherent power to order coercive civil confinement is of ancient and traditional origins. Armstrong's statutory arguments, however, present the question whether the district court still retains this power.

The lower federal courts are creatures of statute. Thus, "the exercise of the inherent power of lower federal courts can be limited by statute and rule." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). "Nevertheless," the Supreme Court explained, "we do not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power." *Id.* (quotation marks omitted). The Supreme Court also has explained that a formal sanctioning system, established by statute or rule, does not necessarily displace the courts' inherent power to sanction for contemptuous conduct "simply because that conduct could also be sanctioned under the statute or [rule at issue]." *Id.* at 50, 111 S.Ct. 2123; *see also id.* at 46, 49, 111 S.Ct. 2123. Thus, it is possible for statutory and inherent sources of judicial authority to coexist.

For Congress to displace or repudiate the lower federal courts' inherent powers, the Supreme Court has demanded something akin to a clear indication of legislative intent. *See,*

e.g., id. at 47, 111 S.Ct. 2123.[1] The Supreme Court has suggested that an indication of legislative intent need not be explicit in order to be clear: " 'Unless a statute in so many words, *or by a necessary and inescapable inference,* restricts the court's [authority] in equity, the full scope of that [authority] is to be recognized and applied.' " *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) (quoting *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946)) (emphasis added). As a result, it appears that Congress may restrict the courts' inherent powers by "inference," but only where such an inference is "necessary and inescapable." *Id.* In the absence of a clear indication, whether express or implied, the Supreme Court has "resolve[d] ambiguities [in the statute or rule at issue] in favor of that interpretation

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1. *See also Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) (stating that " 'the comprehensiveness of [the courts'] equitable [authority] is not to be denied or limited in the absence of a clear and valid legislative command' " (quoting *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946))); *Link v. Wabash R.R. Co.,* 370 U.S. 626, 630-32, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (holding that a federal district court has the inherent power to dismiss a case *sua sponte* for failure to prosecute, even though the language of Federal Rule of Civil Procedure 41(b) seemed to require a motion of the party, because *sua sponte* dismissal "has generally been considered an inherent power" and if the Court was "to assume that [Rule 41(b)] was intended to abrogate so well-acknowledged a proposition" it "would require a much clearer expression of purpose than Rule 41(b) provides"); *Hecht Co. v. Bowles,* 321 U.S. 321, 330, 64 S.Ct. 587, 88 L.Ed. 754 (1944) (concluding that "if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain").

which affords a full opportunity for . . . courts to [act] in accordance with their traditional practices." *Hecht Co. v. Bowles,* 321 U.S. 321, 330, 64 S.Ct. 587, 88 L.Ed. 754 (1944); *see also Weinberger,* 456 U.S. at 320, 102 S.Ct. 1798 (quoting the same passage from *Hecht*). With these principles in mind, we turn to Armstrong's arguments that Congress intended to limit the lower federal courts' inherent power to order coercive civil confinement.

A. Non-Detention Act

Armstrong argues that, through the passage of the Non-Detention Act, 18 U.S.C. § 4001(a), Congress eliminated the lower federal courts' inherent power to order coercive civil confinement. The Act, which grew out of a desire to prohibit unauthorized executive detention, provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a).

According to Armstrong, "[the Recalcitrant Witness Statute] is the only statute in the United States Code . . . authorizing coercive detention [for contemptuous conduct before or ancillary to] court proceedings." Because his detention has exceeded the duration permitted under that statute, Armstrong argues that he is being held in violation of the Non-Detention Act. We disagree.

We hold that the Non-Detention Act is not an obstacle to Armstrong's detention for the purpose of securing his compliance with the district court's order to produce the corporation's assets. Assuming that the Non-Detention Act has any application to coercive confinement in the face of a

finding of civil contempt-a point we need not decide-the Judiciary Act of 1789, which established the lower federal courts, provides sufficient statutory authorization to satisfy any requirement of the Non-Detention Act. The power to confine to coerce compliance with court orders is such a fundamental and well-established incident of judicial power that, in creating the lower federal courts, Congress implicitly vested them with that power. Although it is unnecessary to decide this additional point, we note that there is every reason to think that the requirements of the Non-Detention Act are also satisfied by 18 U.S.C. § 401, which should be understood to authorize imprisonment on findings of both civil and criminal contempt.

1. In establishing the lower federal courts, Congress vested in them the inherent power to order coercive civil confinement.

Although the courts' inherent powers do not draw from any specific grant of statutory authority, *Hudson,* 11 U.S. (7 Cranch) at 34 (stating that inherent powers are "not *immediately* derived from statute" (emphasis added)); *see also Link,* 370 U.S. at 630-31, 82 S.Ct. 1386, they nevertheless owe their existence to the statutes which established the lower federal courts, *Robinson,* 86 U.S. (19 Wall.) at 510 ("The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."). For this reason, " 'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.' " *Chambers,* 501 U.S.

at 43, 111 S.Ct. 2123 (quoting *Anderson,* 19 U.S. (6 Wheat.) at 227). We conclude that these organic statutes are sufficient to satisfy the Non-Detention Act's statutory authorization requirement.

When Congress established the lower federal courts and vested them with the "judicial Power of the United States," U.S. Const. art. III, § 1, it was not operating in a vacuum. The "judicial Power" consisted of all the inherent powers of the courts of justice necessary to their functioning and naturally included the power to enforce their orders through contempt. In the years immediately preceding our Nation's founding, the contempt power was acknowledged to be "as ancient as the laws themselves." William Blackstone, 4 *Commentaries* *282. In his influential *Commentaries,* Blackstone also made the case for this inherent contempt power:

> [The] laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.

Id. Scholars of a more recent vintage have traced the exercise of the contempt power to as early as the twelfth century. *See, e.g.,* Joseph H. Beale, Jr., *Contempt of Court, Criminal and Civil,* 21 Harv. L.Rev. 161, 164 (1908) (explaining that

"[i]n the time of Henry II [who reigned from 1154-1189] it was laid down that if a tenant duly summoned in the court was absent, the king or his justices might at their pleasure punish him for his contempt of court" (footnote omitted)).

The contempt power that Blackstone described in his *Commentaries,* however, was not limited to what we now describe as punitive or criminal contempt, but included also the coercive power now described as civil contempt. *See* William Blackstone, 3 *Commentaries* *443-45 (stating that if a civil defendant failed to appear when summoned, he would be held in "contempt" and was subject to a writ of attachment, which could lead to his "commit[ment] to the fleet, or other prison, till he puts in his appearance, or answer, or performs whatever else [the court's] process is issued to enforce"); *see also id.* at *445 (explaining that "the same kind of process is issued out in all sorts of contempts during the progress of the cause, if the parties in any point refuse or neglect to obey the order of the court"). Remedial or coercive civil contempt was employed as early as the fifteenth century. *See* Beale, *supra,* at 169-70 ("As early as the time of Richard III [who reigned from 1483-1485] it was said that the chancellor of England compels a party against whom an order is issued by imprisonment; and a little later it was said in the chancery that 'a decree does not bind the right, but only binds the person to obedience, so that if the party will not obey, then the chancellor may commit him to prison till he obey . . . .'" (footnotes omitted)); *cf.* David Eady & A.T.H. Smith, *Aldridge, Eady & Smith on Contempt,* § 1-47, at 15 (2d ed.1999) (noting that, in cases reported between 1557-1604, English Chancery courts would compel obedience to their orders through imprisonment); *see also Ex parte Grossman,*

267 U.S. 87, 111, 121, 45 S.Ct. 332, 69 L.Ed. 527 (1925) (explaining that, long before the time of our Constitution, the law of contempt recognized a remedial or coercive component "necessary to secure the rights of the injured suitor").

Armstrong's principal objection to our conclusion-that Congress, through the creation of lower federal courts, authorized coercive confinement in the face of civil contempt-is that the inherent powers are not explicitly authorized by statute. In our view, however, that does not render the existence of such powers any less an incident of legislative grace. The inferior federal courts are entirely creatures of statute; through their establishment by the Judiciary Act of 1789, they were invested with "[t]he judicial Power of the United States" as authorized by the Constitution. U.S. Const. art. III, § 1; *see also id.* art. I, § 8, cl. 9 (authorizing Congress to "constitute Tribunals inferior to the supreme Court"). Because the power to enforce its decrees by confinement in cases of disobedience has long been generally understood to be an attribute of judicial power, the legislation that established the lower federal courts implicitly vested those courts with that attribute. In the event the Non-Detention Act applies to a federal court's power to enforce its orders by confinement, the enactment establishing those courts satisfied its requirement of a statute of Congress.[2]

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2. Although we express no view on this point, we note that an argument can be made that Congress never intended for the Non-Detention Act to apply to a federal court's inherent power to enforce its orders by coercive civil confinement. *See, e.g.*, 117 Cong. Rec. 31,541 (1971) (statement of Rep. Poff) ("It is not the committee's

(Cont'd)

2. Congress also specifically authorized indefinite, coercive civil confinement.

Although the statutory creation of the federal courts is sufficient to meet the requirements of the Non-Detention Act, there is also every reason to believe that in addition to the Judiciary Act of 1789, Congress specifically authorized indefinite, coercive civil confinement through the enactment of the provision now codified at 18 U.S.C. § 401.

Section 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as –

(Cont'd)
intent to eliminate any detention practices presently authorized by statute or judicial practice and procedure . . . . Detentions incident to judicial administration such as those authorized by the judicial authority to maintain order in a courtroom, judicial contempt powers, and the judicial authority to revoke bail or parole, are not within the intendment of the committee's amendment."); *see also id.* at 32,145 (statement of Sen. Inouye) (explaining that the House bill "should be viewed as in no way granting authority to eliminate any detention practices now authorized by statute, judicial practice or procedure, such as . . . judicial authorization to revoke bail or parole, or to detain those so as to maintain order in the courtroom"); *cf. id.* at 31,541 (statement of Rep. Kastenmeier) ("[The amendment] provides that there must be statutory authority for the detention of a citizen by the United States. Existing detention practices are left unaffected. Incarceration for civil and criminal contempt . . . are already covered by statutes.").

> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401. Armstrong's contempt would appear to fall within the third category of contempt. *See* 18 U.S.C. § 401(3).

Armstrong argues that because this provision uses the word "punish," it "has nothing to do with *civil* contempt, only *criminal* contempt." However, § 401's use of the term "punish" must be viewed in the context of its predecessor statutes, which plainly included within the meaning of "punish" a court's coercive civil contempt power, as well as the power to sanction a contemnor criminally.

The Judiciary Act of 1789 expressly granted the lower federal courts the "power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." ch. 20, § 17, 1 Stat. 73, 83. In reference to this enactment, the Supreme Court has explained that "the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to . . . established rules and principles of the common law." *Ex parte Savin,* 131 U.S. 267, 275-76, 9 S.Ct. 699, 33 L.Ed. 150 (1889). Until the nineteenth century,

English courts did not distinguish between the criminal contempt power and the power to order coercive civil confinement, the latter of which the courts of England had utilized since the fifteenth century. *See* Beale, *supra,* at 167-70; *see also Grossman,* 267 U.S. at 111, 121, 45 S.Ct. 332; *cf.* Eady & Smith, *supra,* § 1-47, at 15.

The Supreme Court of the United States did not recognize this distinction between criminal and civil contempt until the end of the nineteenth century, *see* Beale, *supra,* at 168, and continued to speak in terms of "punishment" with regard to both even after drawing that distinction:

> It is not the fact of *punishment,* but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the *punishment* is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

Gompers, 221 U.S. at 441, 31 S.Ct. 492 (emphasis added); *see also Lamb v. Cramer,* 285 U.S. 217, 220, 52 S.Ct. 315, 76 L.Ed. 715 (1932) (using the term "punish" to describe the civil contempt sanction); *McCann v. N.Y. Stock Exch.,* 80 F.2d 211, 215 (2d Cir.1935) (L.Hand, J.) (describing civil contempt as "a remedial punishment").

In 1831, Congress first enacted the statute that restricted the circumstances under which contempt sanctions could be employed-restrictions that today are embodied in 18 U.S.C. § 401-without drawing any distinction between criminal and

civil contempt sanctions. The triggering event was an infamous incident in which a judge summarily imprisoned and suspended an attorney for writing an article critical of one of the judge's opinions.[3] Section 1 of the Act of March 2, 1831, styled as "declaratory of the law concerning contempts of court," provided:

> That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except [1] the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, [2] the misbehaviour of any of the officers of the said courts in their official transactions, and [3] the disobedience or resistance by any persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

ch. 99, § 1, 4 Stat. 487, 487-88. This provision was eventually combined with the 1789 provision to form section 725 of

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3. The story of Judge James H. Peck's actions, which drew the ire of the general public and led to impeachment proceedings that fell just one vote short of convicting the embattled jurist, has been catalogued by numerous academics and commentators. *See, e.g.*, Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States*, 28 Colum. L.Rev. 401, 423-30 (1928) (describing the events which culminated in Judge Peck's impeachment proceedings); *see also* Dudley, *supra*, at 1034 n. 32.

the Revised Statutes-a byproduct of the codification efforts of the 1870s. *See* Rev. Stat. § 725 (1875).[4]

Revised Statute § 725 continued to use the term "punish" without distinguishing between coercive civil and criminal contempt sanctions. With reference to this statute-which had been in force since December 1, 1873, *United States v. Gillis,* 95 U.S. 407, 409, 24 L.Ed. 503 (1877)-the Supreme Court in *In re Chiles,* 89 U.S. (22 Wall.) 157, 168, 22 L.Ed. 819 (1874), stated:

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4. Section 2 of the Act of 1831 provided a further declaration on the law of contempt, as it related to sanctions for acts of corruption, threats, or force intended to "influence, intimidate, or impede any jury, witness, or officer" of the courts of the United States; it provided that such contempts were subject to prosecution, indictment, and conviction and could "be punished, by a fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both." Act of March 2, 1831, ch. 99, § 2, 4 Stat. 487, 488. During the codification process, sections 1 and 2 of the Act were placed in separate sections of the Revised Statutes. *See* Rev. Stat. § § 725, 5399 (1875); *see also Savin,* 131 U.S. at 274-75, 9 S.Ct. 699 (setting forth the relevant session-law provisions and their code-section corollaries); Nelles & King, *supra,* at 431 n. 157. Also during the codification process, "the language [in section 1 of the Act of 1831] was changed to eliminate the reference to 'attachments' and 'summary punishments,' *see* Rev. Stat. § 725 (2d ed. 1878), though there is no evidence whether this was intended as a substantive change." *Dudley, supra,* at 1034 n. 32; *see also Savin,* 131 U.S. at 274-75, 9 S.Ct. 699. Section 1 was subsequently re-codified and placed in the Judicial Code, 28 U.S.C. § 385 (1926), whereas section 2 was placed in the Criminal Code, 18 U.S.C. § 241 (1926).

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> Section 725 of the Revised Statutes declares that the courts of the United States shall have power to punish by fine and imprisonment for contempts of their authority. And among the cases specially enumerated are "disobedience or resistance by any officer of the court, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." Such has always been the power of the courts both of common law and equity. The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, *to compel his performance of some act or duty required of him by the court,* which he refuses to perform.
>
> In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offence. In the latter case, *the party refusing to obey should be fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it.*

Id. (footnote omitted) (emphasis added).

Section 268 of the Judicial Code of 1911 reiterated Revised Statute § 725. *See* Act of March 3, 1911, ch. 231, § 268, 36 Stat. 1087, 1163 (later codified at 28 U.S.C. § 385 (1926)). The Act of 1911 did not alter the terms of the contempt power in any material respect; it continued to authorize the courts to "punish [contempts of their authority]

by fine and imprisonment," and it continued to limit the exercise of that power to the three classes of contempts first identified by Congress in the Act of 1831. *Id.*[5]

In 1948, Congress relocated the latest iteration of the contempt statute, § 401, in Title 18 of the United States Code, the home of most criminal statutes. The move did not alter the terms of the statute in any material respect from section

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5. By 1940, three federal appellate courts, including this court, had held that section 268 of the Judicial Code of 1911 not only applied to remedial civil contempt (and, by implication, permitted a court to "punish [such contempts] by fine or imprisonment"), but also restricted the exercise of that authority to the three categories of contempt provided in that section. *See Raymor Ballroom Co. v. Buck,* 110 F.2d 207, 210-12 (1st Cir.1940) (holding that resisting a writ of execution was contempt within the meaning of section 268 of the Judicial Code and affirming the order of the district court, which directed the contemnors to pay a remedial fine to the plaintiffs); *In re Sixth & Wisconsin Tower, Inc.,* 108 F.2d 538, 539-41 (7th Cir.1939) (holding that section 268 applied to a remedial order directing one party to pay a fine to another, but reversing the contempt order because the purportedly contemptuous act did not fall within any of the three categories of contempt set forth in the statute); *Berry v. Midtown Serv. Corp.,* 104 F.2d 107, 108-11 (2d Cir.1939) (affirming an order of the district court denying a motion to show cause why the defendant should not be fined for civil contempt because the defendant's actions did not fall within any one of the three categories set forth in section 268); *cf. Sixth & Wisconsin Tower,* 108 F.2d at 542-46 (Evans, J., concurring in part) (arguing that Congress could not limit the district court's inherent power to order remedial civil contempt and, as a result, construing the statute to reach only criminal contempt, but concurring in the judgment of the court because the district court failed to provide an adequate contempt hearing).

268 of the Judicial Code of 1911. There is no indication from § 401's text or legislative history that the incorporation of the provision into Title 18 was intended by Congress to abrogate the statutory authorization of the coercive civil contempt power that had existed since 1789 and had been maintained in the embodiments of 1831, 1875, and 1911.

Throughout the history of § 401's predecessor statutes, the term "punish" has been used indiscriminately to refer to civil and criminal contempt sanctions alike. Thus, the statutory use of the term "punish" at a time when the law drew no distinction between civil and criminal contempt sanctions, and its continued use in statutes to apply to both after the law recognized the distinction, can only lead to the conclusion that the judicial power to invoke coercive contempt sanctions is statutorily authorized by § 401 and is therefore not barred by the Non-Detention Act.

B. Recalcitrant Witness Statute

Armstrong contends that his confinement for refusing to comply with the court's production order falls under the terms of 28 U.S.C. § 1826(a), and that he must be released because his confinement has continued beyond the eighteen-month maximum period of confinement allowed by that statute. Section 1826(a) authorizes a court to order coercive civil confinement of a "recalcitrant witness" for up to eighteen months where such a "witness[,] in any proceeding before or ancillary to any court or grand jury of the United States[,] refuses without just cause shown to comply with an order of the court to testify or provide other information,

including any book, paper, document, record, recording or other material."

In support of his claim that he is protected by the statute's eighteen-month cap, Armstrong argues that, under the reasoning of *United States v. Hubbell*, 530 U.S. 27, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000), his compelled production makes him a "witness" under the Fifth Amendment because his production of the assets of the corporation could be used in a criminal prosecution to show his criminal possession of those assets. The Supreme Court in *Hubbell* reasoned that the act of production itself may implicitly communicate statements of fact, such as the witness's admission that the documents existed and were in his possession and control. Because that implicit admission could be used in a criminal prosecution against the person producing the documents, for such purposes as proving his wrongful possession of them, the Supreme Court concluded that production of documents would be testimonial and protected by the Fifth Amendment. Armstrong argues that, based on the same line of reasoning, he should be considered a "witness under § 1826(a) because he is being 'called upon to perform a testimonial act.' " His argument is misplaced.

First, Armstrong is not a "witness" under the Fifth Amendment. The reasoning of *Hubbell* was not addressed to the circumstances of a custodian of corporate property who is directed to disgorge it. As explained above, the circumstance of the custodian of corporate property is covered by the Supreme Court's earlier ruling in *Braswell*. *Braswell* made plain that, while a custodian of corporate property may not invoke Fifth Amendment protection against

compelled production of the corporation's property, he is protected against the *use* of his compelled production as evidence to show that he possessed the property. *Braswell,* 487 U.S. at 118, 108 S.Ct. 2284 ("In a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by . . . the custodian."). In other words, the very reasoning of *Hubbell* on which Armstrong relies to demonstrate that he is a "witness" did not disturb *Braswell*'s holding with respect to custodians of corporate property.

Furthermore, § 1826(a) requires more than that the contemnor be a witness. The statute applies only to a witness who "refuses without just cause shown to comply with an order of the court to testify or provide other information." 28 U.S.C. § 1826(a); *see also* S.Rep. No. 91-617, at 57 (1969) (stating that the statute was intended "to deal with witnesses who are unlawfully withholding information necessary to move forward an investigation"). Armstrong relies on the Sixth Circuit's ruling in *United States v. Mitchell,* 556 F.2d 371 (6th Cir.1977), to establish that his refusal to comply with the court's order was a refusal to provide information falling within the scope of § 1826(a). His argument fails. In *Mitchell,* two indicted defendants were directed by the court to furnish voice exemplars. They had no right under the Fifth Amendment to refuse the order because the giving of voice exemplars is not considered being "a witness against [one]self," as it is not a testimonial act. *Id.* at 382. The defendants refused to give the exemplars, and after a hearing at which the defendants testified to "their reasons for opposing the order," *id.* at 381, they were found to be in

civil contempt and were confined to coercive confinement. The Sixth Circuit determined that the confinement in excess of eighteen months violated § 1826(a). The court concluded that the order to produce voice exemplars was an order to "provide . . . information" under the terms of § 1826(a), with the consequence that the defendants were protected by the statute's eighteen-month limitation.[6] In defending the appeal, the government argued that § 1826(a) did not apply because it protected only "witnesses," and the defendants did not fall within that category because they were defendants. The court rejected that contention. The defendants were "in fact acting as 'witnesses' when directed to produce the information, even though the non-testimonial nature of the evidence makes Fifth Amendment protections inapplicable

Statute established a legislative presumption that confinement beyond eighteen months offends the Due Process Clause. We reject both assertions.

The length of coercive incarceration, in and of itself, is not dispositive of its lawfulness. The Supreme Court has stated that a court may jail a contemnor "*indefinitely* until he complies," *Bagwell,* 512 U.S. at 828, 114 S.Ct. 2552 (emphasis added), or until he establishes that compliance is no longer possible, *Rylander,* 460 U.S. at 757, 761, 103 S.Ct. 1548; *see Maggio,* 333 U.S. at 74, 68 S.Ct. 401. Civil confinement only becomes punitive when it loses the ability

Appendix A

The Court's statement in *Maggio* can be viewed as an "inference that may be drawn under most circumstances when a contemnor, despite long confinement, fails to comply with an order." *Chadwick v. Janecka,* 312 F.3d 597, 611 (3d Cir.2002) (Alito, J.). "Thus, in most cases, after a certain period, the inference that the contemnor is unable to comply becomes overwhelming." *Id.* at 612. Armstrong's case, however, is not the ordinary case. Fifteen million dollars is a life-altering amount of money.[7] We think that the value of the concealed property is a significant factor to the extent that it would lead the contemnor to conclude that the risk of continued incarceration is worth the potential benefit of securing both his freedom and the concealed property. *See Armstrong III,* 284 F.3d at 406 ("True, Armstrong has been confined for more than two years, but the length of confinement must be viewed in the light of the value of the concealed property, which is unusually great.").[8]

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7. In his briefing, Armstrong argues that the district court "inflated" the value of the missing assets "by disregarding competent evidence" in the form of Nigel Kirwan's declaration. We disagree. Kirwan did *not* state that he took possession of $10 million in missing assets; he simply stated that Armstrong had agreed to provide him with $10 million in exchange for future profits from a joint business venture. If anyone is guilty of inflating, it is Armstrong who has inflated the value of Kirwan's declaration. Moreover, Armstrong did not proffer Kirwan as a witness at the hearing, and therefore did not present his adversaries with an opportunity to cross-examine him. The district court was justified in disregarding the affidavit.

8. We recognize that the keys-to-his-prison rationale has its critics. *See, e.g.,* Dudley, *supra,* at 1063. The principal objection is that if the contemnor lacks the ability to comply, and if he fails to

(Cont'd)

Appendix A

Armstrong misunderstands the import of *Maggio* when he argues that it was intended to establish a rule that, upon the passage of some specific period of coercive imprisonment that fails to induce compliance, an inference must be drawn of an inability to comply. *Maggio*'s point was rather to explain that a *previous* finding made by a court that the subject of an order had been able to comply, but had contumaciously refused to do so, does not bar reexamination of the question of the subject's ability to comply at a later time, especially when changes in circumstances since the making of the first finding, including time spent in jail without producing compliance, provides strong reason to doubt the contemnor's continued ability to comply.[9]

(Cont'd)
convince the court of this fact, he could be incarcerated indefinitely. Such a concern need not trouble us, however, because Armstrong has never made a serious effort to demonstrate that compliance is impossible.

9. We believe that Judge Sotomayor advances a similarly mistaken argument in her concurring opinion by arguing that there is no practical difference between one who is "incapable of complying" and one who "simply chooses not to do so." According to Judge Sotomayor, in either case, "there is a limit to how long [that person] can be incarcerated." We disagree. In the first place, there is no justification for incarcerating a person who is "incapable of complying" even for one day. Furthermore, the point of *Maggio* and *Chadwick* is precisely that there is a crucial difference between one who is capable of complying and refuses to do so and one who is not capable of complying. In light of this precedent, we decline to adopt a rule eliminating that distinction, as it would provide a contemnor who is capable of complying with a powerful incentive to resist a court's lawful order based on the hope that simple resistance will result in her freedom. These two classes of contemnors are fundamentally different and should not be treated similarly in "divining the line between coercive and punitive sanctions."

We also reject Armstrong's contention, also advanced by Judge Sotomayor in her concurring opinion, that Congress intended the Recalcitrant Witness Statute to indicate a presumptive benchmark suggesting a limit dictated by the Due Process Clause for all coercive confinements. Section 1826(a) was carefully drafted to apply to one particular category of contemnor: A "witness . . . [who] refuses without just cause shown to comply with an order of the court to testify or provide other information." 28 U.S.C. § 1826(a); *see also Gelbard v. United States,* 408 U.S. 41, 73, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972) (Rehnquist, J., dissenting) (stating that the statute expresses a "desire on the part of Congress to treat separately from the general contempt power of courts their authority to deal with recalcitrant witnesses in court or grand jury proceedings"); *Mitchell,* 556 F.2d at 383 (stating that the statute "deals with civil contempt for certain specific acts"). Nothing in § 1826(a) suggests that Congress intended that it apply as a presumptive benchmark, or in any other way, to contemnors who do not fit within that category.

Furthermore, we can easily appreciate that the class of contemnors for which Congress established the eighteen-month ceiling can present circumstances that understandably motivated Congress to establish such a ceiling for that particular class. Persons who go to jail rather than obey a court order to testify frequently do so in the service of some useful and socially worthwhile principle. In some cases (which invariably receive widespread publicity and therefore have surely come to the attention of Congress), it is a journalist who believes she would violate the ethical standards of her profession if she revealed a source to whom

she promised confidentiality. In other cases, it is a member of some other profession-medical, legal, religious-who similarly believes that the ethical standards of her profession would be compromised by revelation of confidences (under circumstances where the court's finding of waiver of a privilege does not convince the witness that any such waiver was voluntary). In still other cases, the court's order to testify forces the witness to violate a loyalty to a family member or close friend. Even when the relationship between the witness and the subject of the testimony sought is merely that of partners in crime, our social mores are not deeply offended by the criminal who would rather spend time in jail than squeal on his partner. Accordingly, in passing a statute which imposes an eighteen-month limitation on coercive contempt confinement for recalcitrant witnesses but not for other categories of civil contemnors, Congress has not acted arbitrarily or irrationally. Although one could argue that not everyone coming within § 1826(a)'s scope is motivated by such admirable purposes, there appear to be good reasons for Congress to have selected for special treatment that class of contemnors.

We also acknowledge that there are situations where a contemnor might not come within the terms of § 1826(a) but whose circumstances nonetheless raise the same types of considerations as those of a recalcitrant witness covered by the statute. Yet Congress need not achieve a perfect fit in enacting legislation. And even if an argument could be made that such a person should benefit from the same ceiling that Congress imposed for the recalcitrant witness, that argument would do nothing for Armstrong. His case does not raise the types of considerations that led Congress to impose a ceiling

for the special benefit of recalcitrant witnesses. The district court's order does not require Armstrong to choose between subservience to law and his ethical principles, nor does it require him to violate bonds of personal loyalty to a family member or friend, or even a partner in crime. According to the district court's findings, Armstrong is motivated by greed. He is willing to suffer time in jail in the hope of ending up in possession of $15 million in assets of a corporation to which he owes fiduciary duties. The Due Process Clause does not demand that the test of his obduracy end today or, for that matter, at any specific time.

Our ruling on this issue of course depends on the district court's finding that Armstrong is capable of complying but chooses not to do so. We note that two years have passed since the district court last held a hearing to determine whether Armstrong was able to comply with its order. As the Supreme Court emphasized in *Maggio,* circumstances can change. A contemnor who was found to be capable of complying with an order to turn over assets at a particular date is not necessarily capable of doing so forever. A person previously found to be in contempt for failure to obey an order to produce property in his possession "would always have the right to be released as soon as the fact becomes clear" that he is no longer capable of obeying because he is not in possession of the property or its proceeds. *Maggio,* 333 U.S. at 72, 68 S.Ct. 401. We believe the district court may not indefinitely rely on its prior finding. After the passage of a significant period of time, a contemnor who is coercively confined and claims, like Armstrong, to be incapable of complying with the court's order, is entitled to have the court convene a new hearing at which the court will reconsider,

regardless of past findings, whether the person is presently capable of complying.

Accordingly, under our supervisory authority, we direct the district court, after giving reasonable notice to the parties so that they may prepare adequately, to convene as soon as practicable a new hearing into whether Armstrong is in possession of the property (or the proceeds thereof) which is the subject of the court's production order so that he is able to comply with it. Further, while we emphasize that we have never found any fault in Judge Owen's skillful handling of this case, we believe that on the seventh anniversary of Armstrong's confinement, his case deserves a fresh look by a different pair of eyes. We therefore direct the district court to reassign the case randomly to a different district court judge on remand.

III. Bail Application

Armstrong argues that the district court abused its discretion when it denied bail pending the resolution of his habeas petition. We find no abuse of discretion.

Armstrong has not overcome the "presumption of correctness" that we must accord a district court's bail determination in a habeas proceeding. *Hilton,* 481 U.S. at 777, 107 S.Ct. 2113; *see also* Fed. R.App. P. 23(d). In any event, Armstrong's claim is moot: He sought bail *pending the resolution* of his petition for a writ of habeas corpus; that controversy ended when the district court denied his petition.

Appendix A

CONCLUSION

\For the foregoing reasons, the orders of the district court are Affirmed. The case is Remanded and ordered to be Reassigned to another district court judge for further proceedings consistent with this opinion.

SOTOMAYOR, Circuit Judge, concurring.

I agree with Judge Walker's opinion in affirming the district court's contempt sanction, but I write separately to articulate my belief that the eighteen-month maximum duration imposed on a civil contempt sanction by the Recalcitrant Witness Statute should be a presumptive benchmark for all civil contempt incarcerations. A sanction lasting more than four times the congressional benchmark for such punishments is so extreme that, as Judge Walker rightly directs, the district court should undertake soon to revisit whether Armstrong's imprisonment has slipped into the impermissible terrain of a punitive sanction.

The Supreme Court has made clear that "[d]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana,* 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). In the context of civil contempt, the Supreme Court has also made clear that, at some point, an imprisoned contemnor must be released: "It is everywhere admitted that even if he is committed, he will not be held in jail forever if he does not comply. His denial of possession is given credit after demonstration that a period in prison does not produce the goods." *Maggio v.*

Zeitz, 333 U.S. 56, 76, 68 S.Ct. 401, 92 L.Ed. 476 (1948). Yet while "the due process test is easily formulated, the point at which coercive imprisonment actually ceases to be coercive and essentially becomes punitive is not readily discernible." *In re Grand Jury Investigation (Joseph Braun),* 600 F.2d 420, 425 (3d Cir.1979) ("*Braun*").

This Court has joined the Third Circuit in holding that the Recalcitrant Witness statute's eighteen-month limit on incarceration for civil contempt represents Congress's carefully-considered attempt to find the line between coercive and punitive detention. *See Simkin v. United States,* 715 F.2d 34, 37 (2d Cir.1983). In *Braun,* the Third Circuit wrote,

> Congress has, in effect, addressed essentially the same problem that courts must tackle under a due process analysis, and has thereby filled the void that existed under prior practice, where there was a possibility that unconscionable, indeterminate periods of confinement might be imposed for civil contempt. It has not been suggested that Congress's resolution of the problem is unreasonable, and it would therefore appear to be inappropriate for the judiciary to substitute its judgment for that of the legislative body by undertaking as a routine matter to draw finer lines than Congress has already drawn between coercive and punitive periods of confinement.

Id. at 427. We endorsed this view in *Simkin,* and credited the eighteen-month time limit as an effort in congressional line-drawing and a presumptive outer bound for civil contempt

sanctions. We held "that in the absence of unusual circumstances," it would be inappropriate for a reviewing court "to conclude, as a matter of due process, that a civil contempt sanction has lost its coercive impact at some point prior to the eighteen-month period prescribed as a maximum by Congress." *Id.* This due process presumption should work in the opposite direction, as well: Except in unusual circumstances, a civil contempt sanction longer than eighteen months should be presumed to be punitive.

My discussion of *Simkin* and *Braun* is by no means meant to suggest that the Recalcitrant Witness Statute's eighteen-month limit is a statutory maximum binding on the district court's exercise of its inherent contempt power. As noted above, I believe that the Recalcitrant Witness Statute's eighteen-month limit represents Congress's best effort to articulate a benchmark where one is "not readily discernible." *Braun,* 600 F.2d at 425. I see nothing in the legislative history or the case law suggesting that Congress's determination of what length of incarceration for contempt comports with due process is limited to § 1826 or to the specific class of contemptuous conduct it covers. This presumptive benchmark places no constraint on the inherent contempt powers of the court, but it should not lightly be ignored.

Two years ago, we found that the district court did not abuse its discretion by finding that Armstrong's continued incarceration serves a coercive purpose. *See SEC v. Armstrong,* 88 Fed.Appx. 460 (2d Cir.2004) (unpublished opinion). But two years have passed, and Armstrong has since pled guilty to conspiracy to commit securities fraud; as Judge Walker has directed, the district court ought now, once again,

to hold an evidentiary hearing to ensure that Armstrong's incarceration remains coercive, not punitive, and that it holds the potential eventually to compel his compliance with the court order. Where, as here, the incarceration is nearly four times the length of the congressional benchmark, the showing of unusual circumstances should become more demanding.

Judge Walker's opinion relies on *Maggio v. Zeitz,* 333 U.S. 56, 76, 68 S.Ct. 401, 92 L.Ed. 476 (1948), to support its holding that Armstrong's incarceration does not violate due process, and draws guidance in its interpretation of *Maggio* from *Chadwick v. Janecka,* 312 F.3d 597 (3d Cir.2002), in which then-Judge Alito interpreted the Supreme Court's statement in *Maggio* as articulating "an inference that may be drawn under most circumstances when a contemnor, despite long confinement, fails to comply with an order." *Id.* at 611. In most cases, Judge Alito continued, "after a certain period, the inference that the contemnor is unable to comply becomes overwhelming." *Id.* Judge Walker's opinion holds that Armstrong's case falls outside the scope of *Maggio* because here, "the value of the concealed property is relevant to the extent that it would lead the contemnor to conclude that the risk of continued incarceration is worth the potential benefit of securing both his freedom and the concealed property." *Supra* 111. While we afford the district court "virtually unreviewable discretion both as to the procedure [it] will use to reach [its] conclusion, and as to the merits of [its] conclusion," *Simkin,* 715 F.2d at 38, in its imposition of contempt sanctions, we still require that the district court adequately assess the possibility that Armstrong's detention does not, and will not, have a coercive purpose, and is now simply punishment for his refusal to

cooperate. The value of the concealed property is only one factor among many that ought to be considered in determining whether unusual circumstances exist to justify a detention lasting longer than eighteen months.

It bears noting that *Chadwick* applies only to those situations in which the length of a contemnor's incarceration gives rise to an inference that he or she is incapable of complying with the court's order. This case presents a different scenario: Here, Armstrong has given us no reason to believe that he is not in possession of the property, other than his own testimony which the district court did not believe. He may not be incapable of complying with the court's order, or rather, he simply chooses not to do so, most likely out of sheer greed. Whether the contemnor's failure to comply with the court's order is attributable to inability or resolute unwillingness, there is a limit to how long he or she can be incarcerated when such a sanction has no coercive power. Armstrong's refusal to comply shares with a journalist's refusal to name her source an unwillingness that, at some point, becomes so steadfast that incarceration cannot be regarded as exerting any coercive effect. At that point, the sanction becomes punitive, and the government or the district court must resort to other measures to secure their desired result.

I do not dispute the assertion made in Judge Walker's opinion that the Recalcitrant Witness Statute and its eighteen-month cap on incarceration for contempt were likely meant to cover a particular category of contemnors whose willingness to go to jail rather than comply with a court order is "in the service of some useful and socially worthwhile principle." *Supra* 112. But for the purposes of divining the

line between coercive and punitive sanctions, I believe that inability to perform and resolute unwillingness to perform must, at some point, be treated similarly. Armstrong has rightfully been sanctioned for his obduracy. But his compliance is seemingly not forthcoming. After nearly seven years, a question arises as to whether any amount of jail time will compel him to produce the goods he undoubtedly possesses. At some point, the district court must turn to the other tools at its disposal both for securing the return of the property allegedly in Armstrong's possession and for punishing him for stealing and keeping it. For example, the government is, of course, free to initiate a criminal contempt proceeding against Armstrong, and if he is convicted, the court is free to impose a lengthy sentence of definite duration. The court could also include a restitution order in Armstrong's sentence, which could result in further punishment if Armstrong refuses to comply with it.

Judge Walker's opinion suggests that there is no discernible outer bound on a court's inherent power to detain a contemnor indefinitely. Indeed, the question of whether such indefinite detention is within a court's inherent power is not before this Court, and I write to underscore my belief that Judge Walker's opinion should not be construed to license such indefinite detention. The district court's finding that Armstrong is motivated solely by greed is not enough to justify disregard for due process. Courts must exercise caution in their use of the contempt power and must recognize when it has reached the limits of its utility. The Fifth Amendment provides the final constraint on incarceration for civil contempt, and I encourage the district court to be vigilant in policing the boundary-line between the coercive and the punitive.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 23, 2004

UNITED STATES DISTRICT COURT
S.D. NEW YORK.

No. 04 Civ. 6943(RO).

Martin A. ARMSTRONG,

Petitioner,

v.

Joseph R. GUCCIONE, U.S. Marshal for the Southern District of New York and Marvin D. Morrison, Warden, Metropolitan Correctional Center,

Respondents.

Dec. 23, 2004.

OPINION & ORDER

OWEN, District Judge.

Martin Armstrong, the petitioner in this habeas corpus, from his multitude of petitions and appeals is hardly unknown to the Southern District Court [1] and the Court of Appeals for

1. The civil case is 99 Civ. 4669; the criminal case is 99 Cr. 00997 and in the Second Circuit there are somewhere in the double

(Cont'd)

the Second Circuit since September 13, 1999, so that only a focused statement of background is needed to put the issues here in perspective. The principal issue here flows from the fact that sometime prior to proceedings being commenced by the SEC and the CFTC and Armstrong's indictment by a Southern District grand jury on the aforesaid September 13, 1999, Armstrong transferred some $16 million corporate monies from the "Princeton" corporations' bank and brokerage accounts to more than twenty dealers to purchase gold bullions, valuable antique coins, and antiquities.[2] The receiver concluded that Armstrong had taken personal possession of the gold, coins, and antiquities, and that he was holding them as a corporate custodian (Armstrong being the Chairman of the Board, a director, an officer, and an employee of the Princeton entities). The receiver, Alan Cohen, appointed that September 13 by Judge Kaplan of this Court, was empowered to order Armstrong and the corporate defendants to turn over to him all books, records, and assets of the Princeton entities which they then had in their current possession and control. The turnover order is beyond any attack on this habeas. *Maggio v. Zeitz,* 333 U.S. 56, 69, 68 S.Ct. 401, 92 L.Ed. 476 (1948).

(Cont'd)

digits of appeals and applications all stemming from the sequel to his ownership and CEO-ship of the many related Princeton corporations which had at their core the business of receiving monies for investment from Japanese corporations and executives which, through allegedly abysmal management eventually turned into a criminal Ponzi scheme. Neither the civil case nor the criminal case have yet been tried (although 5 years have passed) as will be observed hereafter.

2. The principal one being a valuable historic bust of Julius Caesar.

Appendix B

In a letter of November 10, 1999, Armstrong's then counsel told the receiver that the petitioner would not return any corporate assets in his possession as this would violate his Fifth Amendment rights. Armstrong was thereafter, as a corporate custodian, served with a subpoena duces tecum seeking production of said corporate assets, records, and computers, among other items.[3] Armstrong did not produce any assets and the receiver moved for an order holding him in contempt. At a January 7, 2000 Court hearing, the receiver submitted extensive evidence establishing Armstrong's purchase of the bullion, coins and antiquities and that they were delivered to him. Armstrong did not present any witnesses or evidence. His lawyers instead argued a turnover would violate his Fifth Amendment privilege. This was denied and Armstrong was directed to comply. Over the next week he turned over $1.1 million of the $14 million of rare coins, but failed to turn over 102 gold bars, 699 gold bullion coins, the bust of Julius Caesar and the remaining gold coins. At the resumed hearing on January 14, 2000, the receiver called several witnesses and while Armstrong called no witnesses, he chose to testify personally. It is to be noted that at that point Armstrong was aware through the Court's observation a week earlier that the Court was acting under

3. At the time of the service of the subpoena, Armstrong was Princeton's Chairman, officer and director, as stated, and there is no evidence he ever resigned before and after the subpoena. Indeed he continued inappropriately to exercise these powers in the Turks and Caicos Islands to try to undermine this Court's jurisdiction. While Armstrong denies contemporaneous knowledge of the receiver's written agreement (the MOA, *see* petition p. 7, fn. 3) to deal with this dated October 7, 1999 and filed with the Court's stamp, October 15, 1999, his lawyer has never denied getting it at that time, *see* 197 F.Supp.2d at 117.

the authority of *Braswell v. United States,* 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988), and that he as a corporate officer had no right to decline to produce any of the items, and that the *Braswell* case had an evidential privilege protecting his act of production from being used against him.[4] The transcript reads:

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4. This is probably the first of a dozen times over the following years that Armstrong was advised that he had no right to interpose a Fifth Amendment privilege against production under *Braswell*-"just put it on the receiver's door-step"-which, however, he continues to claim ever since January 14, 2000. Armstrong has also since that time continuously contended that *the Court had ordered him* to give testimony (giving rise to his oft repeated Fifth Amendment assertion). However, the transcript of January 14, 2000 at p. 99 above completely undercuts this reading. While Armstrong quotes the Court's language as follows to support this claim:

> [I]f there is nonproduction, I'm going to want a competent explanation. I don't want a Fifth Amendment explanation. I don't want a rank hearsay explanation.

He omits, however, the critical continuation of the Court's language:

> I want something where even the lawyers, if necessary, say "we went here and we went there and we looked at this and we did that," and then you swear to it. So if there is nonproduction on any item, I want an explanation of how come no production.

Thus, the District Court did not compel him to testify. Rather, it was simply stating that neither the assertion of a Fifth Amendment right nor hearsay would suffice to meet petitioner's responsive burden. *United States v. Rylander,* 460 U.S. 752, 757, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983).

Appendix B

THE COURT: Were you about to address the court?

MR. FELD [Armstrong's counsel]: Yes, your Honor. Last Friday, January 7, your Honor directed Mr. Armstrong to turn over all the corporate assets in his possession and all of the corporate records and documents in his possession.

Your Honor ruled that he was a custodian of records and that pursuant to the *Braswell* decision he had no right to decline to produce that and to comply with that order and that the *Braswell* evidential privilege protected his act of production.

This record on whether Mr. Armstrong has to the best of his ability within the time allotted him complied to your Honor's order can only be demonstrated if we hear Mr. Armstrong's testimony on what he did to comply. *I would offer his testimony limited to the issues of compliance* with your Honor's

THE COURT: Let's go.

Mr. FELD: *I call Mr. Armstrong to the stand.*

(emphasis supplied).

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With regard to the missing rare coins and the bust of Julius Caesar,[5] Armstrong without any support other than his testimony stated that he transferred most of them to an Australian business associate, Nigel Kirwan, in September 1998, in a business transaction.[6] Armstrong also acknowledged that as to the missing 102 gold bars, he said he took them home and "slid them underneath the three cushion sofa that was there in the living room [in New Jersey]." He testified that several months later he gave them to a Japanese business associate, Akira Setogawa, as part of a settlement for his interest in his in a joint business venture. According to Armstrong, Setogawa came to see him in a limousine and "the transfer was made in the parking lot, from the trunk of my car to the limousine." With respect to the 699 gold bullion coins, Armstrong testified that he gave away some "for gifts and bonuses to employees around the world" and some gifts to Japanese visitors. The Court of Appeals later noted in 2001, 269 F.3d 109, 112:

> Armstrong claimed at the July 6 hearing that he lacked the ability to produce the items that he had been ordered to produce. The District Court rejected the claim, ruling that this contention was inadequately supported. *See Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir.1995) ("burden

5. As to coins turned over to the receiver, Armstrong claims he had kept them "hidden in a shed in the backyard." As to a computer he turned over, he had stripped it of its hard drive.

6. The receiver thereafter submitted evidence that Armstrong purchased more than $2.3 million of the coins *after* the September 1998 alleged turnover transaction to Kirwan.

> of proving *plainly and unmistakably* that compliance is *impossible* rests with the contemnor") (citations and internal quotation marks omitted).

(emphasis in original). And a year later, a similar observation was made by another Court of Appeals panel, *see Commodity Futures Trading Com'n v. Armstrong,* 284 F.3d 404, 406:

> Armstrong had the burden of producing evidence to show that he cannot comply with the order. The district court observed that Armstrong has come forward with none. On appeal, Armstrong does not challenge that finding (or cite any new evidence). Rather, he argues that the length of his confinement (now more than two years), combined with his repeated declarations that he will not comply with the contempt order, compel the conclusion that, in fact, he will never comply, and thus that the order has lost its coercive effect. He also argues that in light of his extended incarceration and the fact that law enforcement authorities have searched his home and offices and found none of the subject assets, the district court could not reasonably have found that the assets remain in Armstrong's possession or control.
>
> Both arguments are meritless. True, Armstrong has been confined for more than two years, but the length of his confinement must be viewed in the light of the value of the concealed property, which is unusually great. Furthermore, we agree with the district court that the coercive effect of Armstrong's incarceration has

> likely been attenuated somewhat by the pendency of his various appeals and petitions for extraordinary relief. Significantly, while the coercive effect of the initial contempt order decreased as the expiration date drew near, the July 6, 2001 order contains no expiration date. With the dismissal of the instant appeal, Armstrong will for the first time be faced with the prospect of indefinite confinement.

Having found that the receiver had established by the clear and convincing evidence that the gold bullion, the coins and the Julius Caesar bust remained in Armstrong's possession, custody or control and he refused to turn them over, Armstrong was ordered remanded in civil custody to the Metropolitan Correctional Center on January 14, 2000 to endeavor to compel the production, and the U.S. Marshals immediately carried that order into effect. Armstrong appealed and the Court of Appeals directed this Court to issue a clarifying order providing further details of findings and conclusions of law which this Court did in August 2000. Since then, Armstrong has pursued many interlocutory appeals from that confinement, including a number that went to full appellate briefing and argument. In these Armstrong repeatedly justified his noncompliance asserting a Fifth Amendment privilege not withstanding this Court's repeated instruction to him that *Braswell* provided protection against the use against him of an act of production, *see supra,* and in his second and third appeals, each brought after 18 months of incarceration he asserts the 18 months limitation in the Recalcitrant Witness Statute, 28 U.S.C. § 1826, usually pertaining to grand jury proceedings, notwithstanding the inapplicability of the section, *see* 152 F.Supp.2d at 458 n. 2, and in any event, the term of incarceration had been made

indefinite with the Court of Appeals' full awareness of this by two panels, *see* 269 F.3d at 112 and 284 F.2d at 406.[7]

Since that time, Armstrong has been brought over from the Metropolitan Correctional Center with some frequency to enable him to address the Court with regard to compliance and ability to comply with the contempt order.

Among those many times, on June 3, 2004, the transcript relevantly reads:

> Mr. Armstrong, you have now sent to me for the Circuit an affirmance of your continuing detention here, dated 26 February 2004, for Judges Walker, Calabresi and Cabranes, which, among other things, they observe that you do not challenge the district court's finding or cite to any new evidence that would suggest to the district court that you could not comply with the turnover order. That is a quote. And they affirmed the discretion of this court to continue to trust that at some point the $15 million of materials would be turned over. This is against a Court of Appeals review of March 18th of 2002.
>
> I have gone back through about seven or eight transcripts looking at what you have been telling me. January 7th of 2002, at that point stating to me that, quote, I spent two years in prison

7. Armstrong erroneously asserts the applicability of 18 U.S.C. § 4001(a) which, however, is addressed to the executive branch and a different problem.

supposedly because I am the director of the institute. February 22nd, among other things, you say, page 51, you have never been given an inventory of what was to be produced, among a number of other things.[8] June 19 is the Mexican standoff quote on your part. Quote, you [referring to the Court] will not change your opinion on my Fifth Amendment and I cannot comply, so I will have to go to trial and at that point we will have to deal with the real issues. September 23rd is the interesting day where we got on the record finally through Mr. Cooper [one of his many lawyers] acknowledging that in the Fifth Amendment context you did in fact say that you do not have to turn over anything. November 7th of 2003, you reiterate again, I have never received an inventory of what was produced or what is claimed to be missing. I don't know what I have to turn over, page 39. When you were asked about are you going to turn anything over, at the prior time you had said that you just don't want to. You said, well, my position is, quote, I haven't made a decision. December 15, 2003, you took the position you didn't have to turn it over because, quote, I don't believe it is constitutional, page 41. *supra.*

. . . February 23rd of 2004, when I made the observation on which [when?] we would see $15

8. [Footnote by the Court] The Court of Appeals had earlier requested and was given an inventory, copy to Armstrong, *see* p. 6 *supra.*

million worth of coins in [and?] gold bars, your answer to me was, perhaps if we go to trial and I can prove my innocence, we might find something very important as to who is actually covering up for whom in this district.

Now, I have gone through all of this . . . because you have now been in going on four years, right?

MR. ARMSTRONG: Four and a half years.

THE COURT: As a United States district judge, I find it just incredibly distressing that with all of that review and with the Second Circuit's review and their observations and my observations and your various positions, I don't have to, I don't want to, I have no need to do it, I have the Fifth Amendment of the Constitution-let's put is this way. It bothered me, as one of my children once said, that the United States District Court can, in my opinion, be played with as you have done with us in this period of time. It seems to me perfectly clear that you do have the power to turn over this material, which is not inconsequential, as the Court of Appeals has said, and, yes, a lot of time has passed, and, yes, it is a lot of money, and I do feel it is there to be gotten and that you are engaged in your, quote, Mexican standoff with us. I am continuing to stand.

Now, I observe to you again the opportunity is here to comply with this. As you know, and we

all know in this room, Mr. Kirwan has no real record, whatever you gave him, anything, Mr. Setogawa, you say you put a million dollars of gold bars in the trunk of his rented limousine and he drove off in New Jersey, with not one single scrap of paper you gave him any of that. So the Court of Appeals has, in my view, observed with the same sense of astonished skepticism that you continue to maintain that these are defenses to a perfectly obvious turnover.

At this point I felt it was appropriate to bring you over since the Court of Appeals sent me most recently, which was given to me on the 7th of May saying we deny the appeal, to give you another opportunity so that nobody can contend that you are not being given every chance to comply. So I put to you again, are you going to or are you not going to?

MR. ARMSTRONG: Your Honor, I think that the opinion of the Court of Appeals, your Honor, throughout this case has always declined to accept jurisdiction. They have never reached the merits of anything, and in this last order they directed that a habeas corpus be filed to create a record for them to review. Now Mr. Sjoblom's firm, Chadbourne & Parke, is in the process of doing that.

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Three months later, September 23, 2004, I had Armstrong back before me. At that time, the brief hearing went as follows:

> THE COURT: There has never been a statement to this Court or them or anybody else that you could not comply; it just was that you wouldn't comply. That is really where we are at.
>
> You have brought a habeas petition through counsel, and I will get to that, I suppose, in a little bit here. I take it your position, as far as a production of things under the contempt order, your position is exactly the same as before, which is not that you can't but that you don't have to and you don't want to. That is really where I continue to see you are at.
>
> MR. ARMSTRONG: Your Honor, I cannot find any case post indictment where anybody -
>
> THE COURT: I am not looking for any cases. I am looking for your state of mind. Does that continue to be your state of mind?
>
> MR. ARMSTRONG: My state of mind is that I stand upon my constitutional rights.
>
> THE COURT: OK.

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I note that in the interim, the Court of Appeals has twice observed, quoted *supra,* that Armstrong does not challenge the finding that he has the ability to turn over the assets.[9]

Accordingly, Armstrong's contention under the § 1826 limit being meritless and inapplicable as the Court of Appeals observed years ago, and the Fifth Amendment claim being no bar to production under *Braswell* because a *Braswell* turnover does not require testimony, and no use can be made of the fact of a simple turnover of corporate assets by a corporate officer, and Armstrong has known this since September 1999, this is no basis for refusing to produce.[10]

---

9. I also note that the Court of Appeals some two years ago made the observation that the coercive effect of Armstrong's incarceration perhaps had been attenuated somewhat by the pendency of his various applications and petitions for extraordinary relief and with that Court's conjecture that these appeals coming to the end he might at last see the light and comply. The pendency of the appeals and petitions, however, has not let up since.

10. Armstrong's contention that a District Court lacks the power to imprison or detain absent a specific "Act of Congress" led in the course of the argument before the Court on January 3, 2004, to the following illuminating exchange. Tr. p. 35.

> THE COURT: [To Armstrong's attorney Mr. Sjoblom] Let's take an absolutely hypothetical case where you have a defendant in front of you, and you happen to have a United States Marshal sitting out in the back. And the next thing you know, that defendant is doing a hundred-yard dash for that door. Okay? Do you mean that I need an act of Congress to scream out, "Marshal, grab him"?
>
> (Cont'd)

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The final claim in Armstrong's habeas petition is that the U.S. Attorney's Office has used the SEC's civil action to violate his due process rights in the parallel criminal case pending before Judge McKenna, and that the District Court's continuing incarceration of Armstrong is allowing the government to manipulate the civil enforcement proceeding to gain advantage in the criminal proceeding.[11] This occasioned me to request and obtain from the U.S. Attorney's Office a Memorandum of Law addressing this. That memorandum recites a number of very material facts destroying Armstrong's contentions and particularly his failure over four years to prepare for his criminal trial. The memorandum points out that in addition to those submissions mentioned earlier, he has made dozens of *pro se* submissions on the criminal side to District Court Judge McKenna regarding such things as: assignment of counsel of his choosing; a modification of conditions of confinement at the Metropolitan Correctional Center; and an order vacating the civil contempt imposed by this Court.[12] But Armstrong has not made any submission on the merits in the criminal case

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(Cont'd)

MR. SJOBLOM: I think you do. I think the judicial-

THE COURT: Oh, please. Come on.

11. This argument was withdrawn at the hearing on this petition, *see* tr. at 83.

12. One of these occasioned the Court of Appeals to write in a Summary Order of February 15, 2001, ". . . petitioner [Armstrong] is warned that the filing of future frivolous mandamus petitions may result in sanctions."

and has only superficially contended he did not have access to discovery. It appears that Armstrong has been given approximately 175 of boxes of discovery, 73 compact discs, virtually unlimited computer access to review and has had three lawyers assigned pursuant to the Criminal Justice Act by Judge McKenna. Armstrong has had a fourth lawyer with regard to the contempt. In May 23, 2003, three and a half years after the indictment, the government stated before Judge McKenna at page 26:

> [ ]Mr. Armstrong is simply upset with the fact that he's been confined on civil contempt. He may or may not have a valid argument. We don't believe they're valid, but they just don't belong here, your Honor, and your Honor has said so on many occasions. And we keep wasting hours and hours and months and months in this proceeding hashing over issues that would have already been litigated or should be properly litigated before Judge Owen. And at some point today, your Honor, if there is an opportunity, I would like to make a proposal about pushing this case along.

Defense counsel responded that "[t]hat's just a waste of time to bother with that at this point."

With regard to Armstrong's claim that he has not had access to discovery, the government stated:

> [W]ith regard to Mr. Armstrong's continued request to access the discovery, we have produced for some time many boxes assuredly. I do recall,

> two and a half years ago there was a proposal or the MCC was permitting Mr. Armstrong to have four to six boxes in his cell at any one time. If Mr. Armstrong can spend a 10th of the time he has spent with all of these pro se submissions actually reviewing the boxes in the last two and a half years, he would have been through the discovery three times by now.

When Judge McKenna tried to set a April 2004 trial date, Armstrong's counsel replied that date was not realistic "because Mr. Armstrong really has not even commenced to review the materials." Armstrong, along with his counsel, claimed he would not be able to review discovery and prepare for trial until he received his own personal laptop computer in prison. The Government noted that:

> [T]he record should be clear on this point, and that is that I think that perhaps the most telling thing [defense counsel] said . . . was that Armstrong in this case, the criminal case, has reviewed virtually nothing. He has been in jail for 4 years. He has reviewed nothing. We went through a great deal of effort to copy everything . . . onto paper. We produced the paper for the very reasons that it was contemplated, lo almost 3 years ago, that Mr. Armstrong would review the materials and we arranged for a larger number of boxes to be made available to him . . . When it comes to the computer, and this I understand from [the MCC's letter to the Court] that to their knowledge Mr. Armstrong has never availed

> himself of the computer that is available to him on the floor [at the MCC] . . . the ball has not been rolling in the discovery in this case because Mr. Armstrong has refused to take advantage of the efforts that have been made by the government to make available to him discovery. He is just simply not looking at it.

A staff attorney with the MCC, Les Owens, explained to Judge McKenna the computer facilities available to Armstrong:

> [W]e ha[ve] taken measures of providing a computer on every housing unit for inmates to review CD-ROMs, added on to the law library, two there, another in the special segregated housing unit.
>
> They are grossly underutilized. They are not used a lot. This is not the situation where there are lines to use the computers. Mr. Armstrong was taken to one of these computers along with Ms. Jackson [an MCC employee]. His unit manager, my colleague in the office [of legal counsel] Mr. Johnson, where they physically plugged in the CD-ROM, verified they do work on the computer provided on the housing unit. There was possibly one CD there was some problem bringing it up ... To my knowledge Mr. Armstrong has never used the computer. He has not filed a single administrative remedy regarding issues. If there are issues with him, if something is not working

properly, your Honor, I submit in the first instance we can rectify it. It has not ... Mr. Armstrong has been given ample time in the law library. He is down there more than any inmate I am aware of. He has a computer on his housing unit, rarely if ever, I don't believe it's been used by other inmates, available at his disposal for the better part of 8, 20, 10 hours a day. He has never requested additional time either on that computer . . . It is MCC's position, your Honor, that they have provided Mr. Armstrong adequate access to a computer for review of these discovery materials. He has brought no problems to our attention with respect to the use of those computers.

I note that Armstrong contends that the area where the computer is located is too noisy and the computer does not have the appropriate software. Two further observations end the discussion in this area: (1) Armstrong provided no rebuttal submission either on the civil or criminal side, notwithstanding one of my clerks spoke with his attorney whether he wished to provide such and was told he did not; and (2) during the course of the argument hereof before me when it got down to discussion on the criminal side of the matter, Mr. Cooper, Armstrong's criminal attorney in the Court spoke out of the blue stating: "Your Honor. Mr. Armstrong has indicated to me that he has authorized me to indicate to the Court that he is prepared to drop this argument entirely." When

> pressed to be specific, Cooper specifically designated the withdrawn argument being argument no. 3 the Manipulation of Civil Case (stated at p. 72 of the petition as: "The District Court's Continuing Incarceration Of Armstrong Is Allowing The Government To Manipulate The Civil Enforcement Proceeding To Gain An Advantage In The Criminal Proceeding").[13]

Given all the foregoing, with regard to the inapplicability of § 1826 and Fifth Amendment rights, these positions are rejected on the law and with regard to the criminal case, after withdrawal of Point No. 3 at p. 72, *supra,* which was at best only conclusorily supported, there is nothing with regard to the criminal case that requires attention of the Court on this motion, particularly given the observation earlier that there were no reply papers by Armstrong disputing either of the opposition memoranda. Accordingly, Armstrong's Petition for a Writ of Habeas Corpus dated August 23, 2004 is denied in its entirety on the undisputed facts and the law.

So ordered.

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13. This withdrawn argument is the same one Armstrong made at pp. 2-3 and 9-10 of the instant petition.

APPENDIX C — RELEVANT STATUTES

18 U.S.C. § 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

* * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 4001. Limitation on detention; control of prisons

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

* * * *

28 U.S.C. § 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order

his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

* * * *

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 17, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 99 CIV. 9667(RO), 99 CIV. 9669(RO)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

PRINCETON ECONOMIC INTERNATIONAL LTD., Princeton Global Management Ltd. & Martin A. Armstrong,

Defendants.

Commodity Futures Trading Commission,

Plaintiff,

v.

Princeton Economic International Ltd., Princeton Global Management Ltd. & Martin A. Armstrong,

Defendants.

July 17, 2001

Appendix D

OPINION & ORDER

OWEN, District Judge.

This Opinion and Order serves to supplement my prior oral findings and order of July 6, 2001 that the previously-imposed confinement of Martin A. Armstrong in the Metropolitan Correctional Center on an order of civil contempt still serves coercive purposes; it might yet yield its intended result and should therefore be continued in order to coerce compliance with this Court's Contempt Order of August 25, 2000. The estimated value of the missing corporate assets, as documented by the Temporary Receiver,[1] is approximately $14.9 million and Armstrong has come forward with not a scintilla of evidence to suggest good faith efforts to comply with the Contempt Order, or that he is either unable to comply or that the contempt has lost all of its coercive effect.

I reached this conclusion at the hearing on July 6, 2001 and, upon receipt of opposition papers from Armstrong's CJA counsel, I reexamined the issue and remain of the opinion, based on my "individualized assessment" of Armstrong and the circumstances of the contempt, *see In re Grand Jury Subpoena (John Doe)*, 150 F.3d 170, 172 (2d Cir.1998), that there is a "realistic possibility" that extending the term of Armstrong's confinement will eventually compel compliance with the Contempt Order. *See Simkin v. United States*, 715 F.2d 34, 37 (2d Cir.1983); *United States v. Salerno*, 632 F.Supp. 529, 531 (S.D.N.Y.1986) (citing *In the Matter of*

1. Judge Kaplan of this Court, sitting in Part I, appointed Alan M. Cohen, Esq. as Temporary Receiver on September 13, 1999.

Milton Parrish, 782 F.2d 325 (2d Cir.1986)). The authority for such continuation is derived from the District Court's general and inherent equitable powers to coerce compliance with its lawful orders.[2] *See Chambers v. NASCO, Inc.*, 501

2. Relying on 28 U.S.C. § 1826, both Armstrong's *pro se* submissions and those of his CJA counsel, suggest that 18 months is the outer limit on Armstrong's period of civil confinement. The "Recalcitrant Witness" statute is inapplicable to this matter because § 1826 "[s]ets a maximum limit of 18 months incarceration for *witnesses* found in civil contempt of court," usually pertains to grand jury proceedings, and does not because of the *ipse dixit* of counsel apply to one under court order to produce missing corporate assets, especially since § 1826 is not cited anywhere in the Contempt Order. *See Sigety*, 632 F.2d at 976 (emphasis added); *see also Dole Fresh Fruit Co. v. United Banana Co., Inc.*, 821 F.2d 106, 110 (2d Cir.1987) (noting distinction between § 1826 and general contempt power to coerce compliance with court ordered equitable relief); *United States ex rel Thom v. Jenkins*, 760 F.2d 736, 737-740 (7th Cir.1985) (upholding continued confinement for civil contempt "until such further order of the court" for failure to pay judgment where district judge had concluded that contemnor failed to produce evidence that he had become unable to pay); *Natural Gas Pipeline Co. of America v. Fritz*, 853 F.Supp. 236, 237 (S.D.Tex.1994) (reading eighteen month period of confinement in § 1826 as applicable only to grand jury proceedings); *Quantum Corp. Funding, Ltd. v. Assist You Home Health Care Servs. of Virginia, L.L.C.*, 2001 WL 637387, at *1-3 (S.D.N.Y. June 8, 2001) (continuing indeterminate period of civil confinement to coerce compliance with preliminary injunction pursuant to general contempt power). I reiterate, as I did on page 26 of my findings of fact and conclusions of law dated August 25, 2000 (the written Contempt Order), that Armstrong's contempt is not based on § 1826, but on the inherent authority of all courts to coerce compliance with lawful orders. Although I did reference eighteen months at the hearing, this was unintentional and, if anything, has *de facto* provided Armstrong with an opportunity to be heard

(Cont'd)

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U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Shillitani v. United States*, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *Sigety v. Abrams*, 632 F.2d 969, 976 (2d Cir.1980).

The burden is on Armstrong to prove impossibility of compliance or that confinement has become punitive and not coercive. *See In re Marc Rich & Co., A.G.*, 736 F.2d 864, 866 (2d Cir.1984); *Simkin*, 715 F.2d at 36-37. Armstrong has not produced the missing black Compaq computer (Contempt Order, ¶ I(1)), the missing gray Dell computer hard drive (Contempt Order, ¶ I(2)) or any additional corporate assets since January 14, 2000, all of which are specifically identified in the Contempt Order of August 25, 2000.[3] Further, Armstrong has communicated no information whatsoever about the present disposition of those items to the Temporary Receiver, despite no fewer than fourteen letters from April 2000 through June 2001 from the Temporary Receiver to

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(Cont'd)

regarding his contempt. Had I not erroneously uttered the words "eighteen months," the hearing of July 6, 2001 would likely have occurred only on an application from Armstrong producing some prima facie evidence of good faith efforts to comply, impossibility of compliance, etc., and tending to suggest that a hearing was warranted. Thus, Armstrong has not been prejudiced by any confusion. I observe further that the Second Circuit seemed quite clear in its summary order dated March 27, 2001 (00-6076, 00-6156) dismissing Armstrong's appeal for lack of jurisdiction that the civil contempt order was premised on the Court's general power.

3. This Court entered "turn-over" orders dated September 13, 1999 (the TRO signed by Judge Kaplan sitting in Part I) and on January 7, 2000.

Armstrong personally and his attorneys; all of this correspondence, the latest of which, representative thereof, is attached hereto as Appendix A, offers the Receiver's assistance in retrieving items identified in the Contempt Order and purging Armstrong's contempt. Nevertheless, Armstrong has not come forward with any evidence regarding the whereabouts, much less produced, the 102 gold bars (Contempt Order, ¶ IV(2)), the 699 gold bullion coins (Contempt Order, ¶ IV(1)), the ancient coins purchased pre-September 1998 (Contempt Order, ¶ IV(4)) and the $750,000 bust of Julius Caesar (Contempt Order, ¶ IV(3)), all detailed, again, in this Court's Contempt Order at pages 9-18 and, once more, in the declaration of Tancred V. Schiavoni, Esq., Special Counsel to the Temporary Receiver, executed on July 6, 2001, at ¶¶ 2-3, 6-12.

The burden of producing such evidence is on Armstrong. "It is well-settled that if a court finds that a defendant could at some time in the past have complied with a court order, the court should presume a present ability to comply. . . ." *See Thom*, 760 F.2d at 739-740 (quoting *United States v. Rylander*, 460 U.S. 752, 757, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983)). The record is clear that Armstrong remains in possession, custody and control of the corporate assets identified in the Contempt Order and, most recently reidentified in the Stamoulis and Schiavoni Declarations. For example, Armstrong testified at the contempt hearing on January 14, 2000 that he took the gold bars from the office at Carnegie Center in 1998, brought them home and subsequently gave them to Akira Setogawa after Setogawa showed up in a limousine at Armstrong's home. However, the limousine driver, Michael Faulkner, whom Armstrong

testified at the contempt hearing witnessed Setogawa take the missing gold bars, denied during a deposition that he ever saw Armstrong give any gold or gold bars to Setogawa. The Temporary Receiver also submitted a signed[4] transcript of the examination of Nigel Kirwan, in a proceeding to which the Receiver was not party, on which Armstrong relies to support his assertion that Kirwan is holding the assets in trust and Armstrong has no control over Kirwan. Armstrong's counsel argued:

> And if I could, your Honor, the only thing is to comment on the Kirwan deposition, which [is] one of the documents of the receiver relies upon-part of the deposition that the receiver cites is that part that talks about the assets being held in trust, that Kirwan's holding certain assets in trust, in Australia, and I don't see, even if Mr. Armstrong is released, he's not traveling to Australia to recover those assets and I don't think that Mr. Kirwan would follow any particular order of Mr. Armstrong to release those assets even if he had the power to ask him to do so.

(Tr. at 30.) Kirwan's answers in this deposition, however, are some of the strangest, most unbelievable, statements this Court has ever encountered. Kirwan claims to be the trustee of two trusts with the same name. (Kirwan Dep. at 89., attached as Ex.18 to Schiavoni Decl.) He testified that one trust has a bank account in Switzerland, (Kirwan Dep. at

4. The transcript of the Kirwan deposition first appeared before me without a signature bearing authenticity. Subsequently, the Receiver filed a signed copy.

91), but he does not know the name of the bank (*id.*) and does not have any documents in Australia that show the identity of the bank (*id.*) despite his position as trustee. If such statements were not enough to warrant dismissal of Kirwan's assertions in this examination, I observe that Kirwan *never* acknowledges *actually having the assets* anywhere in the transcript.

Put simply, there is no new evidence before me. Armstrong has provided me, but mostly the Court of Appeals, nothing but self-serving and conclusory statements that he does not have possession, custody or control over the assets sought by the Temporary Receiver, but has come forward with no hard evidence to substantiate this assertion. *See Rylander*, 460 U.S. at 757-758, 103 S.Ct. 1548 (holding defendant does not meet burden of production with an ex parte affidavit denying ability to comply). Thus, he has not satisfied his burden of production.

Armstrong's remaining assertion is that he cannot comply, and cannot be ordered to comply, with the Contempt Order because he is under indictment in a parallel criminal proceeding. Armstrong argues that, even assuming he had possession, custody or control of the missing corporate assets, compliance with the Contempt Order violates his Fifth Amendment privilege. This assertion must be disregarded on two grounds. First, Armstrong has undeniably waived his Fifth Amendment privilege. He did so on January 14, 2000 at the Contempt Hearing when he testified regarding the factual circumstances surrounding the gold bars, the coins, antiquities and bust of Julius Ceasar and, moreover, that he no longer had possession of these items-all testimony I did not credit. Regardless of my credibility determination on these issues, had he wished to remain silent for fear of self-incrimination at that time, he could

have done so by asserting the Fifth Amendment. His failure to do so operates as a waiver of the privilege.[5] Second, Armstrong's mountain of papers do not support any assertion of the Fifth Amendment. His current position, documented in an affidavit attached to his counsel's papers of July 11, 2001, is that he does not have possession, custody or control of the missing corporate assets. If this is the case, the Fifth Amendment cannot be asserted in good faith. In my effort to truly make an "individualized determination" about the Contemnor and the circumstances surrounding his contempt. I have reviewed the submissions and proceedings in the Second Circuit. Even the Court of Appeals expressed disbelief regarding his Fifth Amendment claim.[6] The following was the colloquy on the issue when the Circuit reviewed the Contempt Order:

> The Court: [7] How does the Fifth Amendment issue arise-um, if, um, if Mr. Armstrong's position is that he doesn't have it? If he doesn't have any of these things, well, isn't it idle to talk about

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5. *See generally Garner v. United States*, 424 U.S. 648, 654, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976); *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984); *United States v. Monia*, 317 U.S. 424, 427, 63 S.Ct. 409, 87 L.Ed. 376 (1943); *United States v. Matos*, 990 F.Supp. 141, 144-145 (E.D.N.Y.1998).

6. The Second Circuit's discussion of the Fifth Amendment issue at oral argument obviously was not integral to its decision to dismiss the appeal for lack of jurisdiction, but arose in the context of a discussion of whether to construe Armstrong's appeal as a petition for a writ of mandamus.

7. Armstrong's appeal was before Chief Judge Walker, Judge Jacobs and Judge Calabresi. Judge Jacobs asked the questions excerpted here.

> whether hypothetically it would be a violation of his Fifth Amendment rights to turn them over? To assert a Fifth Amendment right, wouldn't Mr. Armstrong have to say, "I have it" and "I won't give it to you because of my Fifth Amendment right?"
>
> SEC: Well, arguably, he has testified that he has had theassets and that he had given them to somebody else, an argument that the District Court does not, um, believe.
>
> The Court: I just find it strange. I mean, I find the assertion of the Fifth Amendment rather strange because usually one says I have something in my head or I have something in my possession that I will not turn over and that is why I'm asserting the Fifth Amendment because there is that possibility of incrimination. Here, his position is entirely different. His position is I don't have any of this stuff. I couldn't turn it over if I wanted to. So I'm not sure I know why the Fifth Amendment issue isreally live here.

Against this background, I am not persuaded by Armstrong's assertion that his confinement for contempt may not continue based on a valid assertion of the Fifth Amendment.

Armstrong has produced no evidence.[8] What he has produced, however, is paper. Armstrong has, to date, filed

8. Armstrong's counsel acknowledged as much during argument before the Court of Appeals. Chief Judge Walker questioned (Cont'd)

no fewer than fifteen "emergency" motions in the Court of Appeals, including, it appears, two petitions for rehearing *en banc*, and, most recently, a petition for *certiorari* in the Supreme Court.[9] Although I will address the content of some of these papers which were put before me by Armstrong's CJA counsel, I do observe that this mountain of paper "[s]uggests the opposite of what, I suspect, was its intended effect." *Quantum Corp.*, 2001 WL 637387, at *2. "It demonstrates that [the contemnor] is beginning to feel the full coercive effects of his incarceration for civil contempt. Colloquially, he wants 'out.' " *Id.*

Turning to the specifics of Armstrong's submissions, his counsel contends that there is no realistic possibility of compliance based on an recent affidavit submitted to the

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(Cont'd)

Armstrong's counsel regarding proof that he gave assets to Kirwan. Armstrong's counsel stated, "He's been unable to produce any direct proof." Judge Jacobs inquired about what evidence Armstrong had to back up his claims about the missing gold bars he purportedly gave to Setogawa. Counsel replied, "He has been unable to produce any documentation that he turned over gold bars to Mr. Setogawa. And, uh, I have nothing else to tell the Court. If I had those documents, believe me, I would be more than happy to provide them not only to the Receiver, but Judge Owen and this Court."

9. In a mandate and order from the Court of Appeals dated February 15, 2001, the Second Circuit, in addition to summarily denying the petition, stated, "[p]etitioner is warned that the filing of future frivolous mandamus petitions may result in sanctions." For a more complete discussion of Armstrong's numerous appeals, see this Court's Memorandum and Order dated March 9, 2001, *SEC v. Princeton Econ. Int'l, Ltd.*, 2001 WL 237376 (S.D.N.Y. March 9, 2001).

Appendix D

Court of Appeals seeking a writ of mandamus to prevent a previously scheduled, and later cancelled, deposition of Armstrong by the Temporary Receiver. Armstrong's affidavit states:

> Fifthly, and perhaps of the most importance, is the firm unshakable belief that I have that the proceedings in this Court are solely designed to curb and destroy my civil rights. And, their intent is solely to create pretrial incarceration to extort, through physical and psychological pressure, cruel and unusual punishment prior to any adjudication, in a vain to attempt to extort, by brute force, a guilty plea in the criminal case. I would sooner waive my right to life than compromise my integrity. I shall not submit-ever-to the demands of this Court as I view them as un-American and perfect examples of how the terms "justice" and "liberty" have become hollow words.[10]

(Armstrong Dep. at 3, attached as Ex. D to Kleinman Decl. and Mem. of Law in Support of Contemnor's Objection to Continued Incarceration, dated July 11, 2001.) Armstrong's counsel contends that these words "[e]stablish the impossibility of Mr. Armstrong's compliance with this order to turn over." (Tr. at 28.) As a threshold matter, "The Court need not accept a contemnor's assertions of unwaivering recalcitrance at face value." *Salerno*, 632 F.Supp. at 531 (quoting *Parrish*, 782 F.2d at 327). Indeed, "[e]ven if the

10. I observe that this affidavit was not even originally put before me; it was submitted to the Second Circuit in connection with an application for a writ of mandamus.

judge concludes that it is the contemnor's present intention never to [comply], that conclusion does not preclude the possibility that continued confinement will cause the [contemnor] to change his mind." *In re Grand Jury Proceedings*, 2001 WL 527401, at *1 (E.D.N.Y. April 27, 2001) (quoting *Simkin*, 715 F.2d at 37) (internal marks omitted). The discretion in deciding whether further incarceration may have coercive effect is unusually broad.[11] *See Simkin*, 715 F.2d at 38.

As Armstrong's protestations and rhetoric become more vituperative with respect to the motivations of this Court, the Temporary Receiver, the SEC, the CFTC and the U.S. Attorney's Office, I am persuaded that he is just now starting to feel some effects of his continued confinement, especially since his appeal of the Contempt Order failed. Further, his various other attempts at undermining the Contempt Order by pursuing extraordinary forms of appellate relief, which have in some respects provided him with hope of release and thereby reduced the coercive effect of incarceration, have fallen short. It is only now that, with the exception of a few petitions that remain *sub judice*, the appellate remedies have yielded no success that he will feel the requisite degree of coercion and understand that the only way out of his civil confinement is compliance with this Court's Contempt Order.

Finally, I observe that while it is a matter of discretion to continue Armstrong's contempt indefinitely-which I am exercising here based on the record before me-I am aware

11. In this regard, I note that the Court may rely on its prior observations of the contemnor and need not hold a new factual hearing. *See Simkin*, 715 F.2d at 38 & n. 3.

that his civil confinement cannot last forever. *See Thom*, 760 F.2d at 740 (quoting *Maggio v. Zeitz*, 333 U.S. 56, 76, 68 S.Ct. 401, 92 L.Ed. 476 (1948)). However, the landscape of caselaw addressing this issue reveals that Armstrong's confinement has not yet approached an inappropriate duration, especially given the enormous value of the missing assets and my finding that his detention remains coercive and not punitive. *See Thom*, 760 F.2d at 740 (considering dollar value of missing assets and contemnor's character); *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1531 (11th Cir.1992) (evaluating contemnor's 22 months of detention at time of decision and holding that civil confinement may continue for "many months or perhaps even several years"); *Hankins v. Civiletti*, 614 F.2d 953, 954-955 (5th Cir.1980) (upholding civil confinement for approximately three years at time of decision where contemnor claimed he lacked possession, custody or control and argued that privilege against self-incrimination spared him production of certain records). In this regard, it is appropriate to note that one in civil contempt keeps the key to his cell in his own pocket at all times.

The foregoing constitute the Court's findings of fact and conclusions of law.

Accordingly, Armstrong's confinement in the Metropolitan Correctional Center on an order of civil contempt will continue with this Court evaluating from time to time, on its own initiative or application from any party to the above-captioned actions, whether release is warranted.

So ordered.

APPENDIX E — INDICTMENT DATED SEPTEMBER 29, 1999

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

MARTIN A. ARMSTRONG,

Defendant.

INDICTMENT

99 Cr. 997 (LMM)

COUNT ONE

(Conspiracy to Commit Securities and Wire Fraud)

The Grand Jury charges:

Relevant Persons And Entities

1. At all times relevant to this Indictment, MARTIN A. ARMSTRONG, the defendant, was a director of, and controlled, Princeton Economics International, Ltd. ("PEI"). PEI was a corporation organized under the laws of the Turks and Caicos Islands, British West Indies, with its headquarters located at 214 Carnegie Center, Princeton, New Jersey. PEI purported to be in the business of providing investment advisory and other financial consulting and management services.

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2. At all times relevant to this Indictment, Princeton Global Management, Ltd. ("PGM") was a corporation organized under the laws of the Turks and Caicos Islands, British West Indies. MARTIN ARMSTRONG was a director of, and controlled, PGM. PGM's activities were primarily conducted from the PEI's headquarters in Princeton, New Jersey.

3. At all times relevant to this Indictment, Cresvale International, Ltd. ("Cresvale"), a corporation organized under the laws of the Cayman Islands, was a wholly-owned subsidiary of PEI. Cresvale International, Ltd,, Tokyo Branch ("Cresvale-Tokyo") was a wholly-owned subsidiary of Cresvale International, Ltd. Cresvale-Tokyo, with offices located in Tokyo, Japan, was a broker-dealer of securities. MARTIN A. ARMSTRONG, the defendant, was the chairman of Cresvale and Cresvale-Tokyo.

4. At all times relevant to this Indictment, Republic New York Securities Corporation ("Republic Securities"), an affiliate of Republic National Bank of New York ("'Republic"), was a broker-dealer of securities registered with the United States Securities and Exchange Commission ("SEC"). Republic Securities was also a futures commission merchant registered with the Commodities Futures Trading Commission ("CFTC"). At all times relevant to this Indictment, Republic Securities operated a Futures Division. Approximately ninety percent of the business conducted by the Futures Division related to accounts controlled by MARTIN A. ARMSTRONG, the defendant.

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Summary of The Princeton Note Scheme

5. As set forth below, from at least as early as 1996 through in or about September 1999, MARTIN A. ARMSTRONG, the defendant, and others known and unknown, engaged in a fraudulent scheme to obtain hundreds of millions of dollars from Japanese investors from the sale of securities issued by various entities controlled by ARMSTRONG. The securities consisted of Notes (the "Princeton Notes") issued by various PGM shell corporations established in the Turks and Caicos islands by MARTIN ARMSTRONG, the defendant. In furtherance of the scheme, MARTIN ARMSTRONG, together with others known and unknown, falsely represented that funds obtained from the sale of Princeton Notes would be held in segregated accounts for each investor (the "Investor Accounts"), as well as (a) the manner in which investor funds would be utilized; (b) the net asset value of the Investor Accounts; and (c) the performance of the investment made with the funds obtained from the sale of the Princeton Notes.

6. From in or about March 1996 to in or about August 1999, MARTIN A. ARMSTRONG, the defendant, received approximately $750 million from the sale of Princeton Notes. The proceeds were placed by ARMSTRONG in various accounts he controlled at Republic Securities. From in or about November 1997 through in or about August 1999, ARMSTRONG lost approximately $367,794,000 million of the proceeds of the Princeton Notes through trading losses. To conceal the losses from investors, ARMSTRONG used funds from more recent investors in the Princeton Notes to repay previous Princeton Note investors. Millions of dollars

were also transferred at ARMSTRONG's direction to PEI entities, Cresvale entities and other companies in Japan. In addition, from in or about 1996 to in or about 1999, ARMSTRONG spent millions of dollars obtained from the sale of Princeton Notes to purchase rare coins and antiquities. As of an or about August 31, 1999, the aggregate amount of Princeton notes outstanding was in the range of $1 billion, while the aggregate amount of Princeton Note proceeds remaining in accounts at Republic Securities was approximately $46 million.

The Sale of Princeton Notes to Japanese Investors

7. MARTIN A. ARMSTRONG, the defendant, sold approximately $3 billion worth of Princeton Notes to Japanese Investors, generally through Cresvale-Tokyo. As of on or about August 31, 1999, Princeton Notes with a face value of approximately $1 billion remained outstanding.

8. The Princeton Notes were issued by related PGM entities ("Issuer" or collectively the "Issuers"), all of them controlled by MARTIN A. ARMSTRONG, the defendant. These Issuers operated under names derived from the basic name "Princeton Global Management [x] Limited," where [x] is a variable that relates in some way to the name of the investor(s) who purchased notes. The names of the Issuers included, for example, "Princeton Global Management M-3 Limited," "Princeton Global Management KSG-1 Limited," "Princeton Global Management KSG-10 Limited," "Princeton Global Management NBIK Limited," and "Princeton Global Management NES-56 Limited."

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9. In connection with each Princeton Note issued, MARTIN A. ARMSTRONG, the defendant, commonly generated the following transactional documents, among others; (a) a promissory note signed in the name of MARTIN A. ARMSTRONG on behalf of the Princeton Note Issuer; (b) a document entitled "Conditions of the Notes" which purports to set forth certain representations and warranties from the Issuer to the noteholder; (c) an "Investment Management Agreement" between the issuer and Princeton Economics International (ASIA) Limited ("PEI-Asia"), signed in the name of MARTIN A. ARMSTRONG on behalf of all parties; and (d) an "investment Advisory Agreement" between the Issuer, PEI-Asia, and PEI, signed in the name of MARTIN A. ARMSTRONG on behalf of all parties.

10. Some of the Princeton Notes were held in the name of the investor that purchased the note, and others were held in the name of Cresvale-Tokyo as a nominee for the investor. Some of the Princeton Notes paid fixed rates of interest and others paid variable rates. Generally, the notes were unsecured, although occasionally repayment of some of the notes was guaranteed by PEI or its affiliates.

11. The Princeton Notes were issued in varying principal amounts, sometimes stated in U.S. dollars and sometimes stated in Japanese yen. Although many of the fixed-rate Princeton Notes were issued in U.S. dollars, both principal and interest payments due under those notes were generally to be paid in Japanese yen. At least a few of the fixed-rate Princeton Notes carried actual rates of return far in excess of their stated interest rates as a result of the fact that the dollar/yen exchange rate used in the note differed substantially from market rates prevailing at the time the notes were issued.

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12. According to the "Conditions of the Notes," the proceeds received from the sale of the Princeton Notes of an Issuer were to be used to establish a fund (the "Trading Fund") for that Issuer. The "Conditions of the Notes" also imposed specific limitations on the use of the proceeds.. In substance those limitations required that, so long as any of the Princeton Notes of an Issuer were outstanding, the proceeds of the sales of the notes were to be used solely to conduct trading activity through the related Trading Fund, pay related expenses and fees, and pay principal and interest due on outstanding notes. Nothing in the "Conditions of the Notes" allows for one Issuer to pay the debts and obligations of another Issuer, for the commingling of one Issuer's assets with those of other Issuers, or for transfers from the account of one Issuer to the account of another Issuer.

13. According to the "Conditions of the Notes" and the Investment Management Agreements, .the Trading Funds were to be managed by Princeton Economics International (Asia), Limited ("PEI-Asia") in conjunction with PEI as Investment Advisor. PEI-Asia was to receive management and performance fees for its services to a Trading Fund. Republic Securities is designated as the fiduciary and custodian of the assets of the Trading Funds. The Investment Management Agreements further provide in substance that (a) the Trading Funds shall consist of "derivative instruments, bonds and/or currencies available in the world financial markets, including futures and options," and (b) the investment manager is authorized to actively manage such investments.

Appendix E

The Princeton Global Account Structure At Republic Securities

14. Beginning in or about 1995, MARTIN A. ARMSTRONG, the defendant, has maintained a variety of accounts at Republic Securities that contained funds raised from the sale of the Princeton Notes. By no later than in or about 1998, many of these accounts were replaced by a single account, namely the Princeton Global Account. That account was established in the name of Princeton Global Management Ltd. and was controlled by MARTIN A. ARMSTRONG. The Princeton Global Account consists of approximately eight trading sub-accounts (the "Trading Sub-Accounts") and numerous sub-accounts established by PEI, from time to time, that contain the proceeds of the sales of Princeton Notes (the "Investor Sub-Accounts").

15. From in or about 1998 to in or about 1999, MARTIN A. ARMSTRONG, the defendant, has caused a separate Investor Sub-Account to be created for each Princeton Note Issuer. For example, there is a sub-account in the name of "Princeton Global Management Sub a/c M-3" that appears to correspond to a Princeton Note Issuer incorporated as "Princeton Global Management M-3, Limited." Each of the Investor Sub-Accounts is subleased to contain the proceeds from the sale of Princeton Notes to a particular investor or from the sale of notes by a particular Issuer. Account opening documents for the various Investor Sub-Accounts, as well as the names on those accounts, generally coincide with the names of particular Issuers. As of August 31, 1999, there were approximately 113 Investor Sub-Accounts at Republic Securities.

16. Little or no trading activity occurred in the Investor Sub-Accounts. Instead, nearly all trading activity occurred

in the Trading Sub-Accounts. MARTIN A. ARMSTRONG, the defendant,, directed the trading in the Trading Sub-Accounts, and profits and losses in the Trading Sub-Accounts were allocated to the various Investor Sub-Accounts according to instructions transmitted to Republic Securities by MARTIN ARMSTRONG or other employees of PEI at ARMSTRONG's direction.

Improper Commingling of Investor Funds

17. Contrary to the "Conditions of the Notes," MARTIN ARMSTRONG, the defendant, commingled the proceeds from the sales of different Princeton Notes and often used funds of one Issuer to repay the obligations of another. Assets in the Investor Sub-Accounts were regularly transferred to and from the Trading Sub-Accounts, and between Investor Sub-Accounts, at the direction of MARTIN ARMSTRONG and his employees at PEI.

18. Assets in one Investor Sub-Account were frequently transferred to another Investor Sub-Account to replace trading losses in the latter account or to replace funds previously transferred out of the latter account to other accounts. In addition, investor funds obtained from more recent sales of Princeton Notes were used to repay earlier investors, more recently obtained funds funds inobtained from more recent sales of from one Investor Sub-Account were [sic]

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The Massive Recent Losses in the Trading Sub-Accounts

19. Beginning in or about February 1995, MARTIN A. ARMSTRONG, the defendant, opened trading accounts in the names of certain Issuers at Republic Securities. On or about November 3, 1997, MARTIN A. ARMSTRONG, the defendant, opened the current eight Trading Sub-Accounts at Republic Securities. Between on or about November 3, 1997, and on or about August 31, 1999, the combined net losses in the Trading Sub-Accounts, including commission charges and margin interest, exceeded approximately $361,700,000.

20. As of in or about August 1999; the face value of the outstanding Princeton Notes was approximately $1 billion. As of on or about August 31, 1999, the total assets remaining in the Princeton Global Account, including all of the Trading Sub-Accounts and all the Investor Sub-Accounts, was only approximately $46 million.

21. From in or about March 1998 to in or about August 1998, more than approximately $750 million was transferred from various Cresvale entities in Japan to the Princeton Global Account and allocated to various Investor Sub-Accounts according to instructions transmitted to Republic Securities by MARTIN ARMSTRONG, the defendant, or other employees of PEI. During that same period of time, approximately $925 million has been transferred out of the Princeton Global Account to various bank accounts around the world, including many accounts that relate to PEI entities, Cresvale entities, companies in Japan and MARTIN A. ARMSTRONG.

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22. A website maintained by Cresvale boasted that PEI had in 1998 earned an average annual rate of return of 20.51 percent from investing the proceeds from the sale of the Princeton Notes. In fact, the Trading Sub-Accounts of the Princeton Global Account have sustained consistent, substantial net losses since at least in or about November 1997. It was a common practice of Cresvale to issue to certain Princeton Note investors monthly statements containing performance data. The performance data contained in the statements was generally inaccurate in that the reports overstated investment performance or failed to accurately reflect overall net trading losses.

The Misleading Confirmation Letters

23. From in or about 1995 to in or about 1999, MARTIN A. ARMSTRONG, the defendant, and other individuals involved in the scheme, (the "Co-conspirators"), caused hundreds of misleading letters (the "Confirmation Letters", to be issued by Republic Securities' Futures Division. The Confirmation Letters purported to confirm net asset values in certain, of the Investor Sub-Accounts. These Confirmation Letters were addressed to MARTIN ARMSTRONG and were sent by the Futures Division to ARMSTRONG at PEI's offices in Princeton, New Jersey. The Confirmation Letters refer to a specific Investor Sub-Account and purport to state the net asset value of cash and securities in that sub-account on a specific date.

24. MARTIN A. ARMSTRONG, the defendant, and PEI employees acting at his direction, requested Confirmation Letters for specific Investor Sub-Accounts and indicated

specifically what net asset values the Confirmation Letters should confirm. The Futures Division issued the Confirmation Letters using the amount specified by ARMSTRONG for that account, regardless of whether the amount specified was in fact a correct statement of the net asset value of the Investor Sub-Account. In nearly all instances, the Confirmation Letters falsely overstated the value of assets in the Investor Sub-Accounts ranging from approximately a few thousand dollars to as much as approximately $46 million.

25. On an almost daily basis, MARTIN ARMSTRONG, the defendant, or a PEI employees acting at his direction, obtained from the Futures Division account statements and other documents which reflected the actual net asset values of the Investor Sub-Accounts and the Trading Sub-Accounts. However, MARTIN ARMSTRONG, or PEI employees acting at his direction, would determine the net asset value to be confirmed by the Futures Division in a particular Confirmation Letter without reference to the actual net value of the Investor Sub-Account. Rather, the confirmation amount was generally determined by taking the face value of the particular underlying Princeton Note and adding to that sum the amount of interest that was supposed to have accrued on the note. When assets actually in the particular Investor Sub-Account were less than the confirmation amount as specified by PEI, PEI often directed the Futures Division to make after-the-fact fund transfers from other Investor Sub-Accounts to cover the shortfall.

26. MARTIN A. ARMSTRONG, the defendant, deceived investors as to the status of their investments, lulled

them into keeping their assets invested in Princeton Notes, and fraudulently induced them to roll over their investments in Princeton Notes and in some instances to increase their investments in Princeton Notes by making available to investors the false and misleading Confirmation Letters and investment performance data.

THE CONSPIRACY

27. From in or about 1996 through in or about September 1999, in the Southern District of New York and elsewhere, MARTIN A. ARMSTRONG, the defendant, and others known and unknown to the Grand Jury, unlawfully, willfully, and knowingly, combined, conspired, confederated, and agreed together and with each other to violate the laws of the United States, to wit, to violate (a) Title 35, United States Code, Sections 78j(b) and 78ff; and Title 17, Code of Federal Regulations, Section 240.10b-5; and (b) Title 18, United States Code, Section 1343.

OBJECTS OF THE CONSPIRACY

28. It was a part and an object of this conspiracy that MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators not named as defendants herein, unlawfully, willfully, and knowingly, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, of the mails, and of a facility of a national securities exchange would and did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing

devices, schemes, and artifices to defraud, (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and (c) engaging in acts, practices, and courses of business which operated and would operate as a fraud and deceit upon the investing public and other persons and entities, in connection with the purchase and sale of securities, all in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.

29. It was a further part and an object of the conspiracy that MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators not named as defendants herein, unlawfully, willfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce numerous writings, signs, signals, pictures and sounds, for the purpose of executing such scheme and artifice to defraud, in violation of Title 18, united States Code, Section 3.343.

MEANS AND METHODS OF THE CONSPIRACY

30. Among the means and methods by which MARTIN R. ARMSTRONG, the defendant, and his Co-conspirators would and did carry out the conspiracy were the following:

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a. MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators sold in excess of $1 billion in Princeton Notes to Japanese investors.

b. MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators fraudulently represented to Princeton Note investors that their investment assets would be held in segregated accounts.

c. MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators caused Republic Securities to issue false Confirmation Letters to Princeton Note investors.

d. MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators provided false Confirmation Letters and account statements to conceal from Princeton Note investors massive trading losses, the commingling of the investors' assets, and the misappropriation of investors' assets.

e. MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators issued false investment performance data concerning the Princeton Notes to obtain investor funds and induce investors to remain invested in the Princeton Notes.

f. MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators caused assets to be transferred between Investor sub-accounts and paid maturing Princeton Notes with assets of more recently issued Princeton Notes to congeal losses, to deceive, investors concerning the disposition of their assets, to induce investors to maintain their investments in the Princeton Notes, and to lull investors into making new investments in the Princeton Notes.

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OVERT ACTS

31. In furtherance of the conspiracy and to effect its unlawful objects, MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators, committed the following overt acts, among others, in the Southern District of New York and elsewhere:

a. From in or about February 1995 to in or about August 1998, MARTIN A. ARMSTRONG, the defendant, caused individual accounts (the "Special' Purpose Vehicle Accounts") to be opened at Republic Securities in the names of various PGM entities and caused assets obtained from the sale of Princeton Notes to be transferred to those accounts through Republic Bank in New York, New York.

b. In or about November 1957, MARTIN A. ARMSTRONG, the defendant, established approximately eight trading accounts at Republic Securities through which he conducted trades collateralized by the assets obtained from the sale of the Princeton Notes.

c. In or about August 1999, MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators, opened an account at Republic Securities in the name of PGM and caused Republic Securities to transfer funds from the Special Purpose Vehicle Accounts to the Investor Sub-Accounts.

d. From in or about no later than 1996 to in or about August 1999, MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators, sold millions of dollars of Princeton

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Notes to Japanese investors and transferred the proceeds through Republic Bank to the Investor Sub-Accounts and Investor Trading Accounts at Republic Securities.

e. From in or about 1996 to in or about August 1999, MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators, caused hundreds of misleading Confirmation Letters to be issued by Republic Securities.

f. On or about November 18, 1998, an e-mail was sent from a PEI employee to Republic Securities requesting certain Confirmation Letters for various Investor Sub-Accounts, specifying the specific amount of the net asset value to be confirmed, and directing that the Confirmation Letters include a sentence indicating that the funds in the Investor Sub-Accounts were held in "AAA Us [sic] Government Securities"

g. In or about July 1999, MARTIN A. ARMSTRONG, the defendant, and his Co-conspirators, caused the president of Republic Securities to issue a letter, dated July 27, 1999.

h. On or about July 6, 1999, the President of Republic Securities sent an e-mail from New York, New York to the President of the Futures Division in Philadelphia, Pennsylvania.

(Title 18, United States Code, Section 371).

Appendix E

COUNTS TWO THROUGH FOUR

(Securities Fraud)

The Grand Jury further charges:

32. The allegations set forth in paragraphs 1 through 26, 30 and 31 are repeated and realleged as if set forth fully herein.

33. On or about the dates set forth below, in the Southern District of New York and elsewhere, MARTIN A. ARMSTRONG, the defendant, unlawfully, willfully, and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, the mails and the facilities of national securities exchanges, did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon persons, in connection with the purchase and sale of securities, to wit, purchasers of the Princeton Notes, as set forth below:

COUNT	NOTE	APPROX. ISSUE DATE	APPROX. MATURITY DATE	APPROX. AMOUNT
TWO	PGM M-3 Ltd.	8/21/98	3/30/99	$10,420,000
THREE	PGM M-3 Ltd.	3/30/99	3/30/2000	$10,420,000
FOUR	PGM M-3 Ltd.	12/24/93	12/24/03	$38,500,000

(Title 15, United States Code, Sections 78j (b) & 78ff;
Title 17, Code of Federal Regulations, Section 240.10b-5;
and Title 18, United States Code, Section 2).

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COUNTS FIVE THROUGH FOURTEEN

(Wire Fraud)

The Grand Jury further charges:

34. The allegations set forth in paragraphs 1 through 26, 30 and 31 are repeated and realleged as if set forth fully herein.

35. From in or about November 1997 to in or about September 1999, MARTIN A. ARMSTRONG, the defendant, unlawfully, willfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did transmit and caused to be transmitted by means of wire communication in interstate commerce the following writings, signs, signals, pictures and sounds, for the purpose of executing such scheme and artifice, as set forth below:

COUNT	APPROX. DATE	APPROX. AMOUNT	WIRE TRANSMISSION
FIVE	11/13/97	$4,027,970	Funds transfer from Bank of Tokyo-Mitsubishi, Japan, to Republic Bank, New York, NY
SIX	6/9/98	$7,078,244	Funds transfer from Bank, of Tokyo-Mitsubishi, Japan, to Republic Bank, New York, NY
SEVEN	6/25/99	$35,544,434	Funds transfer from Bank of Tokyo-Mitsubishi, Japan, to Republic Bank, New York, NY
EIGHT	10/6/98	$21,746,768	Funds transfer from Bank of Tokyo-Mitsubishi, Japan, to Republic Bank, New York, NY
NINE	4/13/99	$16,509,415	Funds transfer from Citibank, Hong Kong, to Republic Bank, New York, NY
TEN	4/8/98	N/A	Facsimile communication from Republic Securities, New York, NY to Republic Securities, Philadelphia, PA

COUNT	APPROX. DATE	APPROX. AMOUNT	WIRE TRANSMISSION
ELEVEN	8/11/99	N/A	Facsimile communication from Republic Securities Philadelphia, PA, to Republic Securities, New York, NY
TWELVE	8/25/99	N/A	Facsimile communication from Republic Securities Philadelphia, PA, to Republic Securities, New York, NY
THIRTEEN	8/27/99	N/A	Two-page facsimile communication from Republic Securities Philadelphia, PA, to Republic Securities, New York, NY
FOURTEEN	8/27/99	N/A	One-page facsimile communication from Republic Securities Futures Division, Philadelphia, PA, to Republic Securities, New York, NY

(Title 18, United States Code, Sections 1343 and 2).

Appendix E

s/ Mary Jo White
MARY JO WHITE
United States Attorney for the
Southern District of New York

APPENDIX F — INDICTMENT DATED JULY 28, 2004

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

MARTIN A. ARMSTRONG,

Defendant.

INDICTMENT

S1 99 Cr. 997 (LMM)

COUNT ONE

(Conspiracy to Commit Securities Fraud, Commodities Fraud, Wire Fraud and Money Laundering)

The Grand Jury charges:

RELEVANT PERSONS AND ENTITIES

1. At all times relevant to this Indictment, MARTIN A. ARMSTRONG, the defendant, held himself out to the investing public as, among other things, an economist, investment advisor, market forecaster, and successful commodities trader. Among other things, ARMSTRONG claimed to have "correctly forecasted every major turn in the financial markets in the last ten years." ARMSTRONG conducted his investment advisory and market forecasting business through a number of corporate entities which he owned and/or controlled.

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2. At all times relevant to this Indictment, Republic New York Securities Corporation ("Republic Securities"), was a wholly-owned subsidiary of Republic New York Corporation ("RNYC") and an affiliate of Republic National Bank of New York ("Republic Bank"). Republic Securities was a broker-dealer of securities registered with the United States Securities and Exchange Commission ("SEC"). Republic Securities was also a futures commission merchant registered with the Commodity Futures Trading Commission ("CFTC") and a member of the National Futures Association. From in or about March 1995 through in or about August 1999, trading activity in accounts controlled by ARMSTRONG, the defendant, produced the majority of the Futures Division's commission revenue and ARMSTRONG was the Futures Division's largest client.

3. During the relevant time period, Republic Securities maintained its principal offices in New York, New York. Republic Securities' "back-office" operations were primarily conducted at its principal offices in New York, New York, and funds held on behalf of customers were held in accounts in the name of Republic Securities at Republic Bank in New York, New York. In or about November 1995, Republic Securities established a branch office in Philadelphia, Pennsylvania (the "Philadelphia Branch"). At all relevant times, the commodity and futures trading operations of Republic Securities, were conducted through its Futures Division. From in or about November 1995 through in or about August 1999, the President of the Futures Division worked out of the Philadelphia Branch.

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4. From in or about March 1995 through in or about August 1999, William H. Rogers, a co-conspirator not named as a defendant herein, was the President of the Futures Division of Republic Securities. From at least as early as 1992 to in or about February 1995, Rogers was a registered representative at Prudential Securities, Inc. ("Prudential"), a broker-dealer of securities registered with the SEC and a futures commission merchant registered with the CFTC. At all times relevant to this Indictment, while Rogers was employed by Prudential and thereafter Republic Securities, Rogers serviced commodity trading accounts controlled by MARTIN ARMSTRONG, the defendant.

5. At all times relevant to this Indictment, Maria Toczylowski, a co-conspirator not named herein as a defendant, was a Vice President of Futures Trading in the Futures Division of Republic Securities, and an assistant to William H. Rogers.

6. At various times relevant to this Indictment, ARMSTRONG, the defendant, owned and/or controlled a number of corporate entities through which he conducted his various business activities including, among many others, the following:

a. Princeton Economics International, Ltd. ("PEI"), a corporation organized under the laws of the Turks and Caicos Islands, British West Indies, with its headquarters located at 214 Carnegie Center, Princeton, New Jersey. PEIL purported to be in the business of providing investment advisory and other financial management and consulting services.

b. Princeton Global Management, Ltd. ("PGM"), a holding company which was purportedly a wholly owned subsidiary of PEIL. PGM, in turn, purported to own a series of special purpose corporations (collectively the "PGM SPV's") which issued securities that were sold to investors between in or about 1992 and in or about 1999. PGM was not in fact incorporated until on or about June 28, 1998, when it was incorporated under the laws of the Turks and Caicos Islands, British West Indies. Similarly, the PGM SPV's were purportedly incorporated under the laws of the Turks and Caicos Islands, but, in fact, many were never formally incorporated. At all times relevant to this Indictment, PGM and the PGM SPVs' activities were primarily conducted from PEIL's headquarters in Princeton, New Jersey. The majority of their assets, however, were held in accounts at Republic Securities in New York, New York.

c. Cresvale Far East Limited ("CFE"), a broker-dealer of securities and a financial services company organized under the laws of Hong Kong. ARMSTRONG acquired CFE in or about November 1995, and CFE became a wholly-owned subsidiary of PEIL. From in or about November 1995 through September 1999, ARMSTRONG controlled CFE and its various subsidiaries.

d. Cresvale International, Ltd. ("Cresvale"), a wholly owned subsidiary of CFE.

e. Cresvale International Ltd., Tokyo Branch ("Cresvale-Tokyo"), a wholly owned subsidiary of Cresvale. Cresvale-Tokyo, located in Tokyo, Japan, was a broker-dealer of securities. Among other business, Cresvale-Tokyo

marketed investment advisory services provided by ARMSTRONG and sold securities issued by companies, such as the PGM SPV's, that ARMSTRONG controlled. From in or about 1995 to in or about September 1999, ARMSTRONG was the chairman of Cresvale.

7. At various times relevant to this Indictment, Harold L. Ludwig, a co-conspirator not named as a defendant herein, acted as an officer of most of the PGM SPVs, and had trading authority over certain of the PGM SPV Accounts. Ludwig was also an employee of Princeton Economics Institute (the "Institute"), another entity under ARMSTRONG's control, and through which ARMSTRONG purportedly provided investment advice and market predictions. Ludwig was authorized to, and did, place orders for the purchase and sale of securities, commodities and futures contracts on behalf of PEIL. Ludwig was registered with the CFTC as a Commodity Trading Advisor ("CTA").

THE SCHEME TO DEFRAUD

Summary of The Princeton Note Scheme.

8. As set forth more fully below, from in or about 1992 through in or about September 1999, MARTIN A. ARMSTRONG, the defendant, and others, known and unknown, engaged in a scheme to defraud investors who purchased certain securities issued by the PGM SPVs (collectively, the "Princeton Notes"). Armstrong, and others, fraudulently induced approximately 139 victim-investors (the "Noteholders") to purchase approximately 400 Princeton Notes for approximately $3 billion. ARMSTRONG placed

proceeds from the sale of the Princeton Notes primarily in accounts he opened and controlled at Prudential and, subsequently, at Republic Securities. Contrary to representations to investors, ARMSTRONG and others engaged in a variety of deceptive and manipulative acts and practices which deceived and defrauded the Noteholders and unlawfully benefitted the participants in the scheme. Those practices included, among other types of conduct: (1) risky and speculative trading activity, concealed from the Noteholders, that resulted in losses of approximately $580 million; (2) numerous misrepresentations to investors designed to conceal these massive losses; (3) the commingling of funds raised from the sale of separate Princeton Notes; (4) the use of funds raised from the sale of newer notes to pay off older notes as they came due, in the manner of a so-called "Ponzi" scheme; and (5) the misappropriation of investor funds for the benefit of Armstrong and others involved in the scheme. As a result of this scheme, the Noteholders suffered losses exceeding $700 million.

The Terms Of The Princeton Notes

9. Generally, each PGM SPV issued a single Princeton Note that was sold to a single investor. Some of the notes paid fixed rates of interest, some paid variable rates of interest, and some provided the Noteholder with an additional return that depended on Armstrong's trading profits. The notes were generally sold with face values ranging from $1 million to $100 million (or an equivalent value in Japanese Yen) and were issued in maturities generally ranging from one to ten years.

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10. Although certain terms varied from note to note, the majority of the Princeton Notes shared common terms. The terms reflected the marketing emphasis, described more fully below, on Armstrong's purported success as a trader of currencies, commodities and a variety of other financial instruments. Under the terms of the Princeton Notes, as memorialized in agreements executed between Armstrong and the Noteholders (the "Princeton Note Agreements"), the proceeds from the sale of each note were to be used to create a "trading fund" that Armstrong, through PEIL acting as the investment advisor, would manage on behalf of the Noteholder. The "trading fund" for each Princeton Note was to be maintained in a segregated account (the "PGM SPV Account") at a brokerage firm in the United States. The proceeds from the sale of one Princeton Note were not to be commingled with the proceeds from the sale of notes issued by any other PGM SPV. Moreover, as the investment advisor, Armstrong was authorized to use the funds in the PGM SPV Accounts only to: (1) execute trades on behalf of the PGM SPV that issued the note; (2) pay interest and principal due on that note; and (3) pay to Armstrong certain management fees based on the value of the assets held in the PGM SPV Account and performance fees based on the results of Armstrong's trading activity. These terms were material to investors because, among other reasons, the sole asset of each PGM SPV was the money obtained from the sale of a Princeton Note and thus these restrictions were necessary to secure repayment of each note and protect each Noteholder's investment.

11. In addition, Armstrong was required periodically to report to each Noteholder the value of the assets in the

Noteholder's PGM SPV Account and the results of Armstrong's trading activity. Under the terms of most of the Princeton Notes, the Noteholder was entitled to redeem the note if the net asset value of its PGM SPV Account fell by more than ten percent.

The Fraudulent Marketing of The Princeton Notes

12. In furtherance of their scheme, Armstrong, his co-conspirators and others caused the Princeton Notes to be sold, principally, by Cresvale-Tokyo and other Japanese brokerage firms to publicly traded Japanese corporations. Although the majority of the Noteholders were large corporations, some Noteholders were individual investors. The Princeton Notes were marketed — primarily by CFE, which, by 1995 was a wholly-owned ARMSTRONG entity — as investment vehicles intended to allow the Noteholders to profit from Armstrong's purported ability to trade successfully in currencies, commodities, futures, and derivatives such as index futures. The Princeton Notes generally offered higher rates of interest than other investment products available in Japan.

13. In furtherance of this scheme Armstrong, together with others known and unknown, made numerous false and fraudulent representations to the Noteholders and to Japanese securities brokers who assisted in selling Princeton Notes. These misrepresentations were intended to, and did, induce the Noteholders to: (1) purchase notes; (2) "rollover" existing notes as they matured; and (3) refrain from redeeming notes prior to their maturity. Those misrepresentations included, among other material matters:

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(a) Claims that Armstrong had achieved a historical "track record" of positive annual trading results on yen-based Princeton Notes between approximately 14.03% and 51.81%, and trading results between approximately 3.6% and 51.37% on dollar-based Notes, when in truth and in fact, Armstrong consistently had lost money from his trading activity.

(b) Claims that funds obtained from the sale of Princeton Notes would be held in segregated accounts for the exclusive benefit of each Noteholder, when in truth and in fact, the proceeds from the sale of different Princeton Notes were commingled and used for a number of improper, undisclosed purposes, including: (i) paying principal and interest due on other notes; (ii) covering trading losses incurred on behalf of other notes; (iii) making unearned distributions to or for the benefit of ARMSTRONG and his companies.

(c) Claims that the proceeds from the sale of the Princeton Notes would be used solely in accordance with the terms and conditions of ARMSTRONG's agreements with the Noteholders, when in truth and in fact, ARMSTRONG and others misappropriated a substantial portion of those funds to, among other things: (i) buy rare coins, antiquities and real estate used by ARMSTRONG; (ii) purchase certain of the Cresvale entities; and (iii) fund the business operations of the various companies that ARMSTRONG controlled.

(d) Claims, from time to time, that ARMSTRONG's trading activity on behalf of the PGM SPV Accounts had been profitable and that, as a result, the net asset value of

the PGM SPV Accounts had increased, when in truth and in fact, ARMSTRONG's trading resulted in massive losses and substantial decreases in the value of the Noteholders' investments.

Operation Of The Scheme From 1992 Througih February 1995

14. From in or about June 1992 through in or about February 1995, ARMSTRONG raised more than approximately $260 million through the sale of approximately 16 Princeton Notes. The proceeds from the sales of those notes were deposited in brokerage accounts, maintained at Prudential Securities ("Prudential") and established in the names of approximately 14 separate PGM SPVs.

15. Between in or about February 1993 and in or about February 1995, ARMSTRONG actively traded in currencies, commodities, futures, and other financial instruments through the PGM SPV Accounts at Prudential. During that period, ARMSTRONG's trading activity resulted in net losses of more than $30 million in the PGM SPV accounts.

16. In furtherance of this scheme, ARMSTRONG hid his trading losses through a variety of means, including by creating and issuing to the Noteholders monthly statements that falsely and fraudulently overstated the value of the assets in each PGM SPV Account and reflected profitable trading activity.

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17. As a result of ARMSTRONG's massive trading losses, many of the PGM SPV Accounts lacked sufficient available funds to repay investors as their respective Princeton Notes became due. To hide from investors the massive trading losses, to ensure that existing Noteholders did not redeem their notes, and to ensure his continued ability to sell new Princeton Notes, ARMSTRONG repaid older notes as they became due by taking funds from the PGM SPIT Accounts of notes that were not yet due, Over time, this practice substantially depleted the value of the PGM SPV Accounts, particularly those Princeton Notes with the longest maturities or which had repeatedly been "rolled over."

18. In or about late 1994, officers of Prudential Securities became concerned about the mounting losses in the PGM SPV Accounts and other accounts managed by ARMSTRONG, as well as a number of multi-million dollar transfers of cash between the PGM SPV Accounts and financial institutions in Japan. As a result, officers of Prudential Securities asked ARMSTRONG, among other things, to explain the nature of his business, to disclose the identities of his clients, and to disclose the terms of his contractual arrangement with his clients. In or about February 1995, after ARMSTRONG refused to identify his clients and otherwise failed to answer other questions satisfactorily, officers of Prudential Securities asked ARMSTRONG to move his accounts to another firm. Thereafter, ARMSTRONG closed the accounts under his control at Prudential Securities and transferred all of the assets to a single bank account in the name of PEIL maintained at First Fidelity Bank, N.A., in New Jersey. In so doing, ARMSTRONG commingled every remaining dollar of the investors' funds.

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ARMSTRONG Moves The PGM SPV Accounts To Republic Securities

19. At or about the time that Prudential Securities terminated its business relationship with ARMSTRONG, ARMSTRONG began to open new accounts at Republic Securities. As set forth above, during the period of time that ARMSTRONG maintained the PGM SPV Accounts at Prudential Securities, all of the accounts controlled by ARMSTRONG were serviced by William H. Rogers, the assigned account representative. At or about the time that Prudential Securities terminated its business relationship with ARMSTRONG, Rogers was hired by Republic Securities and later became the President of Republic Securities' Futures Division.

20. In or about March 1995, ARMSTRONG opened approximately 10 accounts at Republic Securities, each in the name of a separate PGM SPV. Thereafter, as ARMSTRONG sold additional Princeton Notes, he generally opened a new PGM SPV Account for each new Princeton Note sold. During 1995, ARMSTRONG opened approximately 36 accounts in the names of various PGM SPVs at Republic Securities and deposited into those accounts approximately $550 million. Over the course of the operation of the scheme through Republic Securities, from in or about March 1995 through in or about September 1999, ARMSTRONG opened a total of more than approximately 450 PGM SPV Accounts and sub-accounts at Republic Securities and deposited into those accounts a total of more than approximately $3 billion. ARMSTRONG quickly became one of Republic Securities' largest and most profitable clients.

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The Structure Of The Princeton Accounts At Republic Securities

21. As set forth more fully below, the structure of the PGM SPV Accounts maintained by ARMSTRONG at Republic Securities changed from time to time during the period from in or about March 1995 to in or about September 1999. In furtherance of the scheme, those changes were designed to cause and caused the following; to the detriment of the Noteholders: (i) allowed ARMSTRONG to commingle Noteholder funds so that assets in one PGM SPV Account could be used to offset losses in another PGM SPV Account or other accounts controlled by ARMSTRONG; (ii) avoided the requirement of allocating gains and losses from ARMSTRONG's trading activity to each of the numerous PGM SPV Accounts; (iii) hid losses; and (iv) lessened financial and other risks faced by Republic Securities as a consequence of ARMSTRONG's ever-increasing trading losses.

22. From in or about March 1995, through in or about November 1997 (the "First Phase"), ARMSTRONG generally opened, and Republic Securities generally maintained, separate accounts for each Princeton Note. In general, during the First Phase, each time ARMSTRONG sold a new note, he incorporated, or purported to incorporate, a new PGM SPV to issue the new note. In addition, ARMSTRONG opened a new PGM SPV Account in the name of the issuing PGM SPV at Republic Securities (the "First Phase Structure"). In most instances, the Noteholders, or their brokers, transferred the funds tendered by the investor as payment for the investor's note directly to the appropriate

PGM SPV Account at Republic Securities. All such funds were held by Republic Securities through its main offices in New York, New York.

23. During the First Phase, when ARMSTRONG executed trades, those trades were allocated to each of the various PGM SPV Accounts according to instructions given, from time to time, by ARMSTRONG to Republic Securities. Over time, as the number of PGM SPV Accounts grew and as the daily volume of ARMSTRONG's trades increased, the administrative burden on Republic Securities to allocate all of the trades increased. During the First Phase, ARMSTRONG's trading activity resulted in aggregate losses' to the PGM SPV Accounts of approximately $280 million. As these losses mounted, and as the value of the assets in certain PGM SPV Accounts dwindled, the practice of allocating trades to all accounts resulted in some accounts, from time to time, having negative balances.

24. In or about November 1997, to reduce the administrative burdens of allocating each day's trades and to reduce credit risk that negative account balances posed for Republic Securities, ARMSTRONG and Republic Securities agreed to create a new account structure that consolidated ARMSTRONG'S trading activity in a smaller number of accounts (the "Second Phase Structure"). The Second Phase Structure, described more fully below, was maintained from in or about November 1997 through in or about November 1998 (the "Second Phase"). As part of the Second Phase Structure, ARMSTRONG, Rogers, and Republic Securities created approximately eight new accounts held in the name of PGM (the "PGM Trading

Accounts"). Thereafter, each of the PGM Trading Accounts was generally used to trade in particular types of financial instruments. For example, Account No. 32017 was designated as the "Princeton Global Management Index Account" and was used primarily to trade Index futures. Account No. 32011 was designated as the "Princeton Global. Management Fixed Yen Account" and was primarily used to buy and sell Japanese Yen and futures contracts for Japanese Yen. All existing trades in the individual PGM SPV Accounts were transferred to the newly opened PGM Trading Accounts.

25. During the Second Phase, ARMSTRONG and Republic Securities continued to open new PGM SPV Accounts for new notes as the notes were sold and to deposit funds received from the Noteholders in those new PGM SPV Accounts. However, during the Second Phase, in violation of the PGM Note Agreements, ARMSTRONG generally executed trades on behalf of the PGM SPVs not in the PGM SPV Accounts but instead in the PGM Trading Accounts. The Second Phase Structure, as ARMSTRONG well knew, was not disclosed to the Noteholders and violated several terms of the Princeton Note Agreements by effectively commingling the assets of all the PGM SPV Accounts to fund trading conducted in the name of PGM, a separate entity.

26. During the Second Phase, ARMSTRONG's trading activity continued to result in substantial losses. Between in or about November 1997 and in or about November 1998, ARMSTRONG'S trading resulted in net losses in excess of approximately $200 million.

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27. Because the PGM Trading Accounts were not separately funded and because substantial losses were incurred in those accounts, assets in the PGM SPV Accounts were, from time to time, sold, and the proceeds used to cover losses incurred in the PGM Trading Accounts. As a result of deceptive practices used by Rogers and others to record such transactions in Republic Securities's books and records, as described more fully below, the PGM Trading Accounts came to have large negative balances. By in or about July 1998, the PGM Trading Accounts had a combined negative net value of approximately $212 million.

28. In or about July 1998, internal auditors employed by an affiliate of Republic Securities brought the negative balances in the PGM Trading Accounts to the attention of the Credit Review Committee of the Board of Directors of Republic Securities' parent corporation, RNYC (the "Credit Committee"). As noted in a report submitted by the auditors to the Credit Committee (the "1998 Credit Review Report"), these negative balances created potential credit exposure for Republic Securities because the negative balances were held in the accounts of PGM which was a separate legal entity from each of the various PGM SPVs. Accordingly, the report concluded, Republic Securities could not look to the assets held in the approximately 151 separate PGM SPV Accounts to satisfy the negative balances absent a cross-margin or guarantee agreement executed by the PGM SPVs in favor of PGM. These concerns prompted the Credit Committee to recommend, at a meeting in or about September 1998, that the PGM SPV Accounts and the PGM Trading Accounts be consolidated into a single account. At a subsequent meeting of the Credit Committee in or about October 1998, the

Chairman of the Committee noted that he was "skeptical and suspicious" of ARMSTRONG's activities and that those activities "look[ed] like a Ponzi scheme."

29. Acting upon the Credit Committee's recommendation, Republic Securities agreed with ARMSTRONG to undertake another restructuring (the "Third Phase Structure") of the PGM SPV Accounts and the PGM Trading Accounts in order to allay the Credit Committee's concerns and forestall any directives to close the accounts. The restructuring was not disclosed to the Noteholders and was contrary to provisions of the Princeton Note Agreements and other representations made by ARMSTRONG to the Noteholders. Moreover, the restructuring substantially lessened Republic Securities' credit exposure while effectively depriving the Noteholders of recourse to the assets they were told would be held in segregated accounts to repay their Princeton Notes.

30. The restructuring occurred in two steps. First, in or about September 1998, Republic Securities, prepared, and ARMSTRONG executed on behalf of certain of the PGM SPVs, a guaranty agreement that pledged the assets of those PGM SPVs as collateral for the negative balances in the PGM Trading Accounts. These guaranty agreements were improper, not disclosed to the Noteholders, and violated certain provisions of the PGM Noteholder Agreements. Like earlier commingling of PGM SPV assets, the guaranty agreements had the effect of making individual PGM Noteholders liable for trading losses occurred on behalf of other investors.

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31. Second, beginning in or about August 1998, ARMSTRONG and Republic Securities agreed to construct a series of so-called "sub-accounts" linked to a "Master Account" held in the name of PGM (the "PGM Master Account"). Thereafter, from in or about August through in or about November 1998, ARMSTRONG and Republic Securities transferred nearly all of the assets in the PGM SPV Accounts to newly-created sub-accounts. After the transfers, in place of each of the PGM SPV Accounts which had held the assets of that PGM SPV in its own name, there was a sub-account ("the PGM SPV Sub-account") which bore the name of the PGM SPV but which was legally held, from Republic Securities' perspective, in the name of PGM, a separate legal entity. At or about the same time each of the PGM Trading Accounts, with their large negative cash balances, was designated as a sub-account of the PGM Master Account. In this manner, ARMSTRONG and Republic Securities fraudulently conveyed all of the assets of the PGM SPVs, and all of the deficit balances of the PGM Trading Accounts, to PGM.

32. As ARMSTRONG well knew, this restructuring substantially lessened Republic Securities' credit exposure while dramatically increasing the credit risks to the Noteholders. The restructuring benefitted Republic Securities by creating a right of set-off, in favor of Republic Securities, between the deficit balances in the new PGM Trading Sub-Accounts and the assets in the new PGM SPV Sub-Accounts. At the same time, the restructuring transferred title to all of the assets of the PGM SPVs to the PGM entity, thereby depriving the Noteholders of recourse to the primary assets available to repay their notes. The restructuring benefitted

ARMSTRONG and his co-conspirators by allowing ARMSTRONG's fraudulent scheme to continue undetected by the Noteholders.

33. After the Third Phase Structure was implemented, from in or about November 1998 through in or about September 1999, as new Princeton Notes were sold, ARMSTRONG and Republic Securities created new PGM SPV Sub-Accounts into which new Noteholder funds were deposited. During this period ARMSTRONG's trading activity was booked generally to the PGM Trading Sub-Accounts. ARMSTRONG's continued trading resulted in substantial additional net losses from in or about November 1998 through in or about August 1999 of approximately $67 million. Indeed, ARMSTRONG's recurring, massive trading losses caused Rogers to remark that "a doofus flipping a . . . coin every day" would have more success than ARMSTRONG. In total, between in or about March 1995 and in or about September 1999, ARMSTRONG's trading on behalf of all of the Princeton Note-related accounts resulted in net losses of more than approximately $550 million.

ARMSTRONG's Commingling of Investor Funds at Republic

34. From in or about 1992 to in or about August 1999, contrary to the "Conditions of the Notes" and other representations to the investors, ARMSTRONG commingled the proceeds from the sales of different Princeton Notes and often used funds of one Issuer to repay the obligations of another.

35. ARMSTRONG frequently transferred assets from one investor account to another investor account in order to:

(a) replace trading losses in the latter account; (b) replace funds previously transferred out of the latter account to other investor accounts; or (c) replace funds which ARMSTRONG had taken out of the account for his own benefit. In addition, to conceal his trading losses and use of the funds for his own benefit, and to induce noteholders to reinvest monies in the Princeton Notes by rolling over their investment into a new Princeton Note, ARMSTRONG used investor funds obtained from later sales of Princeton Notes to repay earlier investors.

36. As ARMSTRONG well knew, this commingling of investor funds operated as a fraud upon his investors. Indeed, ARMSTRONG informed one investor that the proceeds from Princeton Notes which pay a fixed rate of interest are "segregated individually," that PEI "is not permitted to wire funds from the account to anyone other than the original source," and that this requirement is strictly enforced by Republic Bank, ARMSTRONG further stated that "[a]ssets cannot be moved around at will in order to issue" an NAV letter, and that "there is no way the PEI can take the assets from a fixed rate note and use them for some other purpose during the month and then return them in time to get a [confirmation letter]. Such activity would be criminal and Republic would not be apart [sic] of such a scheme."

ARMSTRONG's False Account Statements

37. From in or about 1992 to in or about 1999, MARTIN A. ARMSTRONG received account statements, first from Prudential and later from Republic Securities, for each of the PGM accounts. ARMSTRONG manufactured his own version of PGM account statements for the investors, which

he generally sent to Cresvale-Tokyo to convert into a Japanese format and forward to the Japanese investors. In the account statements he prepared, ARMSTRONG misled the investors by failing to disclose the actual trading losses in their accounts, misrepresenting the net asset value of their accounts, and in some instances by providing account statements for accounts that he never opened, having instead transferred the investors' money directly into a PEIL operating account, or to another investor to repay that investor's Note. In addition, the account statements ARMSTRONG manufactured and caused to be sent to the investors falsely represented that he was entitled to millions of dollars in management fees and performance fees to which, as he well knew, he was not entitled in light of his dismal trading performance and the shrinking value of the Investor accounts.

The Issuance of False Net Asset Value Confirmation Letters

38. From time to time, between in or about November 1995 and in or about August 1999, at ARMSTRONG'S direction, Republic Securities issued net asset value confirmation letters (the "NAV Letters") for certain PGM SPV Accounts which falsely represented the value of the assets in those accounts. The NAV Letters were used by ARMSTRONG to mislead Noteholders and to hide the massive trading losses which ARMSTRONG was incurring. Between in or about September 1995 and in or about August 1999, ARMSTRONG directed Republic Securities to issue more than approximately 200 NAV letters, the majority of which misrepresented the value of the PGM SPV Accounts

to which the letters related. In many instances the NAV Letters were completely false. In other instances, ARMSTRONG transferred funds from one PGM SPV Account to another, after-the-fact, in order to make the balance in the relevant account equal to the balance reflected in the NAV Letter.

39. The NAV Letters purported to confirm net asset values in certain of the Investor Accounts. These NAV Letters were addressed to ARMSTRONG and were sent by the Futures Division to ARMSTRONG at PEI's offices in Princeton, New Jersey. The NAV Letters referred to specific investor accounts and purported to state the net asset value of cash and securities in that account on a specific date. In nearly all instances, the NAV Letters falsely overstated the value of assets in the Investor Accounts, ranging from approximately a few thousand dollars to as much as approximately $46 million.

40. ARMSTRONG and PEI employees acting at his direction requested NAV Letters for specific Investor Accounts and indicated specifically what net asset values the NAV Letters should confirm. Rogers, on behalf of the Futures Division, issued the NAV Letters using the amount specified by ARMSTRONG for that account, regardless of whether the amount specified was in fact a correct statement of the net asset value of that account.

41. On an almost daily basis, ARMSTRONG, the defendant, or a PEI employees acting at his direction, obtained from the Futures Division account statements and other documents which reflected the actual net asset values

of the Investor Accounts and the Trading Accounts. However, ARMSTRONG, or PEI employees acting at his direction, would determine the net asset value to be confirmed by the Futures Division in a particular NAV Letter without reference to the actual net asset value of the Investor Account. Rather, the confirmation amount was generally determined by taking the face value of the particular underlying Princeton Note and adding to that sum the amount of interest that was supposed to have accrued on the note.

ARMSTRONG's Fraudulent "Netting Out" Transactions

42. By in or about March 1999, ARMSTRONG'S trading losses had depleted investor assets to such an extent that he was running out of funds to maintain the Ponzi-like nature of his scheme and to repay old investors whose Princeton Notes were coming due. From in or about March 1999 through in or about April 1999, ARMSTRONG effected a series of transactions, which ARMSTRONG termed "Netting Out" transactions, that he well knew were contrary to the terms of the Princeton Notes, were a fraud upon his investors, and which were designed to keep his fraudulent scheme operating.

43. Under the terms and conditions of the Notes, investors typically transferred Japanese Yen to an account maintained by Cresvale-Tokyo, which would then wire the funds to Republic Securities to be converted into United States dollars and deposited in a newly opened Investor Account (the "Purchasing Investor Account"). When an investor wished to redeem a Note, or when a Note matured,

the funds from that investor's account (the "Redeeming Investor Account") were, generally after being converted to Yen, wired back to the investor in Japan.

44. In the "Netting Out" scheme, Cresvale-Tokyo received the new investor funds, in yen, in Japan. Rather than wire the funds to Republic to be deposited into the Purchasing Investor's Account, ARMSTRONG fraudulently caused Cresvale-Tokyo to use the new investor's funds to pay back the previous investors whose Princeton Notes were maturing at the same time. At ARMSTRONG's direction, whatever remaining dollars happened to be left in the Redeeming Investor's Account at Republic would be fraudulently transferred to the Purchasing Investor's Account at Republic, which, as a result, held far less money than the Purchasing Investor paid for the Note.

45. As ARMSTRONG well knew these "netting out" transactions were contrary the Terms and Conditions of the Notes, which prohibited ARMSTRONG from commingling the funds of investors, and which required him to deposit the funds of a Princeton Note investor directly into a separate account opened at Republic Securities in the name of the particular PGM SPV and maintained for the benefit of that investor.

Other Misrepresentations to Conceal the Losses and Looting of Investor Accounts

46. As ARMSTRONG's trading losses grew, and the investors' funds were depleted through his fraudulent scheme, ARMSTRONG made a series of additional false statements

and misrepresentations to investors about their funds designed to lull and hide from them his fraudulent activity. Among those misrepresentations were the following.

47. For example, from in or about January 1998 to in or about August 1999, ARMSTRONG misled certain investors about the status of their investments by falsely representing that he had invested their funds in various "Venture Capital" investments which either did not exist or which were grossly over-stated in value.

i. In or about January 1998, ARMSTRONG sent PEI monthly statements to several Princeton Noteholders which, for the first time, informed them that they held investments in 'Venture Capital." The total amount of this purported "Venture Capital" investment was over $45 million. When questioned about the nature of the investments, ARMSTRONG informed Cresvale-Tokyo that 'Venture Capital" referred to an investment in an Australian gold mine.

ii. As ARMSTRONG well knew, this representation was false as, in or about January 1998, PEI had made no such investment in an Australian gold mine. In or about that time, ARMSTRONG, was approached about investing in a gold mining venture in Australia called Charter Towers Gold Mines NL ("Charter Towers"). PEI did not actually invest in Charter Towers for another six months, and at no time did PEI's stake approach the tens of millions of dollars ARMSTRONG falsely represented to investors that they owned.

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48. ARMSTRONG also falsely represented to certain investors that he had invested on their behalf in "Internet Venture Capital" which did non-exist. For example:

i. In or about June and July 1999, ARMSTRONG represented to approximately 43 investors in their monthly statements that they held investments in "Internet Venture Capital." This "Internet Venture Capital" ranged from approximately $600,000 to approximately $20 million, and the purported aggregate investment in "Internet Venture Capital" was approximately $136 million.

ii. As ARMSTRONG well knew, no "Internet Venture Capital" investment was ever made either using funds from these Noteholder Accounts, nor from PEI funds on behalf of these Noteholders. When investors with purported "Internet Venture Capital" investments sought early redemption of their Princeton Notes, ARMSTRONG falsely represented that they could not receive the portion of their investment in "Internet Venture Capital" because that investment was illiquid.

ARMSTRONG's Fraudulent Use And Misappropriation Of Investor Funds

49. In addition to the commingling of funds and use of newer investor funds to repay old investors, ARMSTRONG fraudulently used and misappropriated investor funds in a number of other ways.

50. Based on his false representations to Noteholders about the net asset value of their investments as well as

purported profits from his trading activity, ARMSTRONG took millions of dollars in performance and management fees to which he was not entitled.

51. Moreover, in order to perpetuate his scheme, and have greater control over the marketing and sale of Princeton Notes, ARMSTRONG, in or about October 1995, purchased CFE, an Asia-based broker-dealer. To generate the funds for this purchase, ARMSTRONG looted approximately five different client accounts. ARMSTRONG, without authorization from any client, transferred from client accounts over $12 million to a PEI account at Republic Securities, and then further transferred these funds to the previous owners of CFE to complete the CFE purchase.

52. ARMSTRONG further misappropriated and stole investor funds to purchase, for his own benefit, rare coins and antiques, gold bars and other valuable and expensive items, such as a multi-million dollar beach house in New Jersey.

53. In or about November 1998, Cresvale, a licensed foreign securities dealer in Japan, joined the Investor Protection Fund ("IPF") in Japan. The IPF was created, by foreign securities companies operating in Japan to provide a source of funds to reimburse Japanese investors in the event that the investors suffered certain types of losses. As a member of the IPF, Cresvale was required to execute a guarantee of one percent of its customers' assets, which amounted to approximately $5 million.

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54. ARMSTRONG, on behalf of PEI, executed an agreement in or about February 1999 whereby Republic National Bank Tokyo ("Republic Tokyo") issued a $5 million Guarantee (the "Guarantee") to the IPF on behalf of Cresvale. In return for the Guarantee, Cresvale was required to open an account at Republic Tokyo, in which sufficient collateral was to be deposited by ARMSTRONG, and which ARMSTRONG would not be permitted to use while the Guarantee was in place.

55. In order to collateralize the Guarantee, the purpose of which was purportedly to protect his investors and satisfy the requirements of the IPF, ARMSTRONG misappropriated funds from one of the PGM Noteholders. In or about February 1999, ARMSTRONG on behalf of PEI, without the knowledge and approval of the investor and contrary to the terms and conditions of the Note, transferred government securities with a value of approximately $6.5 million from a Princeton Noteholder account at Republic to a Cresvale account at Republic Tokyo to collateralize the Republic Tokyo Guarantee.

ARMSTRONG's Attempts to Conceal His Fraudulent Scheme From Japanese and U.S. Authorities

56. In or about the spring of 1999, a Japanese securities regulatory authority (the "FSA") began an inquiry into PEI and Cresvale and the sale of Princeton Notes to Japanese investors and, in particular, whether the funds entrusted to ARMSTRONG by the Noteholders had been handled according to the representations made by ARMSTRONG.

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57. In order to mislead the FSA and lull his investors into believing that their funds had been safeguarded as he had promised, on or about August 11, 1999, ARMSTRONG requested that Republic Securities prepare a letter designed to conceal his trading losses and misuse of investors funds, and mislead the FSA into believing that ARMSTRONG actually had the hundreds of millions of dollars of Noteholder funds that the Noteholders had been led to believe. Republic Securities, at ARMSTRONG's direction, prepared and delivered to ARMSTRONG a letter stating that a certain series of accounts maintained by PET had approximately $369 million on deposit (the "Balance Letter"). As ARMSTRONG well knew, that statement was false and misleading, for it omitted mention of the corresponding debits in the trading accounts which Republic Securities had not yet offset against those accounts. As ARMSTRONG well knew, had the debits been properly accounted for, the actual amount of funds that should have been reflected in the Balance Letter was approximately $16 million.

58. After obtaining the Balance Letter, ARMSTRONG, through his affiliated entities, continued to receive requests for information from the FSA about the funds maintained by Republic Securities. In order to obstruct and delay the FSA investigation, on or about August 16, 1999, ARMSTRONG requested that Republic Securities prepare a letter stating that it would issue no more NAV letters because Republic Securities had deemed them to be "burdensome" and "unreasonable." As ARMSTRONG well knew, this statement was false, for he dictated the language to be contained in the letter, and no one at Republic Securities had ever indicated that they would not be willing to continue to provide NAV letters at ARMSTRONG's request.

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59. Sometime shortly thereafter, in August 1999, the FSA sent a letter directly to Republic Securities asking questions about the safety of the funds custodied by Republic Securities on behalf of the Noteholders, and attaching to that letter a copy of one of the NAV letters provided by ARMSTRONG to one of the Noteholders (the "FSA Letter"). ARMSTRONG was informed about the FSA Letter by one of his co-conspirators at Republic Securities.

60. As ARMSTRONG well knew, the FSA Letter would likely be brought to the attention of more senior executives at Republic, and it was likely to cause senior Republic employees not aware of the fraudulent scheme to scrutinize more closely ARMSTRONG's activity. ARMSTRONG'S fraudulent scheme was likely to be detected.

61. Sometime shortly thereafter, in or about late August 1999, ARMSTRONG directed one of his employees at PEI to remove from PEI's records, and put into boxes, and download from PEI's computers onto disks, certain documents that ARMSTRONG well knew were among the most incriminating and which clearly reflected his fraudulent activity, including the false account statements ARMSTRONG provided to the Noteholders (the "Incriminating Documents"). The PEI employee carried out ARMSTRONG's request, and left the boxes and computer disks in ARMSTRONG's bookkeeper's locked office. A short time later, during the weekend, ARMSTRONG came to PEI's offices and removed from its premises all of the Incriminating Documents.

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62. On or about August 30, 1999, senior employees at Republic, as a result of the FSA Letter, began an inquiry into Republic Securities relationship with ARMSTRONG, and, among other things, became aware of the hundreds of false NAV Letters. Republic Securities notified U.S. governmental authorities, and in or about early September, the United States Securities and Exchange Commission ('SEC") brought an action against ARMSTRONG and his affiliated entities and obtained a temporary restraining order (the "SEC Action"). In connection with the SEC Action, the United States District Court for the Southern District of New York ordered ARMSTRONG to turn over to a court-appointed Receiver millions of dollars worth of gold coins, gold bars, rare coins and antiquities (the "Multi-million Dollar Property), computers (the "Computers") and other material paid for with Noteholder funds by PEI (the "Turn-Over Order").

63. ARMSTRONG knowingly and willfully failed to comply with and obstructed the Turn-Over Order, by failing to produce the Multi-Million Dollar Property. ARMSTRONG further knowingly and willfully failed to comply with and obstructed the Turn-Over order by failing to produce certain computers called for in the Turn-Over order, and by purposely destroying files from one of the computers he did produce pursuant to the Turn-Over Order.

THE CONSPIRACY

64. From in or about 1992 through in or about September 1999, in the Southern District of New York and elsewhere, MARTIN A. ARMSTRONG, the defendant, and others known and unknown, unlawfully, willfully, and knowingly,

combined, conspired, confederated, and agreed together and with each other to violate the laws of the United States, to wit, to violate: (a) Title 15, United States Code, Sections 78j(b) and 78ff; and Title 17, Code of Federal Regulations, Section 240.10b-5; (b) Sections 4b(a)(2)(i) and 9 of the Commodity Exchange Act, Title 7, United States Code, Sections 6b(a) (2)(i) and 13; (c) Sections 4b(a)(2)(iii) and 9 of the Commodity Exchange Act, Title 7, United States Code, Sections 6b(a)(2)(iii) and 13; (d) Title 18, United States Code, Section 1343; and (e) Title 18, United States Code, Section 1957(a).

OBJECTS OF THE CONSPIRACY

65. It was a part and an object of this conspiracy that MARTIN A. ARMSTRONG, the defendant, together with others known and unknown, unlawfully, willfully, and knowingly, directly and indirectly, by the use of the means and instrumentalities of interstate commerce, of the mails, and of a facility of a national securities exchange would and did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing devices, schemes, and artifices to defraud, (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and (c) engaging in acts, practices, and courses of business which operated and would operate as a fraud and deceit upon the investing public and other persons and entities, in connection with the purchase and sale of

securities, all in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.

66. It was a further part and an object of the conspiracy that MARTIN A. ARMSTRONG, together with other co-conspirators not named as defendants herein, unlawfully, willfully and knowingly would and did cheat and defraud and attempt to cheat and defraud persons, in and in connection with orders to make, and the making of, contracts of sale of commodities for future delivery, made and to be made, for and on behalf of other persons, such contracts for future delivery being and being able to be used for hedging transactions in interstate commerce in such commodities and for determining the price basis of transactions in interstate commerce in such commodities, in violation of Sections 4b(a)(2)(i) and 9 of the Commodity Exchange Act, Title 7, United States Code, Sections 6b(a)(2)(i) and 13.

67. It was a further part and an object of the conspiracy that MARTIN A. ARMSTRONG, together with other co-conspirators not named as defendants herein, unlawfully, willfully and knowingly, in and in connection with orders to make, and the making of, contracts of sale of commodities for future delivery, made and to be made for and on behalf of other persons, such contracts for future delivery being and being able to be used for hedging transactions in interstate commerce in such commodities and for determining the price basis of transactions in interstate commerce in such commodities, would and did willfully deceive and attempt to deceive other persons in regard to such orders and contracts and the disposition and execution of such orders and

contracts, and in regard to acts of agency performed with respect to such orders and contracts for such persons, in violation of Sections 4b(a)(2)(iii) and 9 of the Commodity Exchange Act, Title 7, United States Code, Sections 6b(a)(2)(iii) and 13.

68. It was a further part and an object of the conspiracy that MARTIN A. ARMSTRONG, the defendant, together with others known and unknown, unlawfully, willfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce numerous writings, signs, signals, pictures and sounds, for the purpose of executing such scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1343.

69. It was a further part and an object of the conspiracy that MARTIN A. ARMSTRONG, the defendant, together with others known and unknown, unlawfully, willfully, and knowingly, in an offense involving and affecting interstate and foreign commerce, unlawfully, willfully, and knowingly would and did engage and attempt to engage in and cause others to engage in monetary transactions in criminally derived property that was of a value greater than $10,000 and was derived from specified unlawful activity, to wit, securities fraud and wire fraud, in violation of Title 18, United States Code, Section 1957(a).

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MEANS AND METHODS OF THE CONSPIRACY

70. Among the means and methods by which MARTIN A. ARMSTRONG, the defendant, and his co-conspirators would and did carry out the conspiracy were the following:

a. ARMSTRONG and his co-conspirators sold approximately $3 billion in Princeton Notes to Japanese investors.

b. ARMSTRONG and his co-conspirators fraudulently represented to Princeton Note investors that the proceeds from their investments would be held in segregated accounts.

c. ARMSTRONG and his co-conspirators caused Republic Securities to issue false NAV Letters to Princeton Note investors.

d. ARMSTRONG and his co-conspirators provided false NAV Letters and false account statements to Princeton Note investors to conceal massive trading losses, the commingling of the investors' assets, and the misappropriation of investors' assets.

e. ARMSTRONG and his co-conspirators issued false investment performance data concerning the Princeton Notes and ARMSTRONG'S historical trading performance in order to induce victims to purchase Princeton Notes, to induce investors not to redeem their notes, and to "roll-over" notes as they matured.

f. ARMSTRONG and his co-conspirators caused assets to be transferred between Investor accounts and paid maturing Princeton Notes with assets of more recently issued Princeton Notes to conceal losses, to deceive investors concerning the disposition of their assets, to induce investors to maintain their investments in the Princeton Notes, and to lull investors into making new investments in the Princeton Notes.

g. ARMSTRONG falsely represented to investors that United States broker dealers such as Republic Securities do not itemize the individual discount notes on account statements, in order to explain to investors why they were not being provided this information.

h. ARMSTRONG misappropriated investor funds and used them to purchase millions of dollars worth of rare coins and antiquities for himself, and other valuable items, including a multi-million dollar beach house in New Jersey.

i. ARMSTRONG fraudulently took millions of dollars from the Noteholders as performance and management fees to which he was not entitled.

j. ARMSTRONG took steps to conceal his fraudulent activity from Japanese and United States authorities, including removing documents from PEI's office, secreting assets paid for by PEI with investor funds, and destroying computer files.

k. ARMSTRONG diverted the proceeds from the fraudulent schemes on the Noteholders to entities under his control, such as to the Princeton Economics Institute.

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l. ARMSTRONG purchased Cresvale Far East and its affiliates in order to, among other purposes: (a) exercise greater control over the marketing and sale of Princeton Notes through Cresvale; (b) prevent Cresvale Far East from going out of business or being sold to new owners who might not continue to market Princeton Notes; and (c) for ARMSTRONG's personal enrichment.

m. ARMSTRONG purchased Cresvale Far East and its affiliates using funds which were derived from the proceeds of this scheme or which were otherwise misappropriated from certain Noteholders.

n. ARMSTRONG and his co-conspirators used facilities of interstate commerce, including the use of interstate telephone calls and interstate and international wire transfers in furtherance of the objects of the conspiracy.

OVERT ACTS

71. In furtherance of the conspiracy and to effect its unlawful objects, MARTIN A. ARMSTRONG, the defendant, together with his co-conspirators, committed the following overt acts, among others, in the Southern District of New York and elsewhere:

a. From in or about February 1995 to in or about August 1999, ARMSTRONG, the defendant, caused individual accounts (the "Special Purpose Vehicle Accounts") to be opened at Republic Securities in the names of various PGM entities and caused assets obtained from the sale of Princeton Notes to be transferred to those accounts through Republic Bank in New York, New York.

b. In or about November 1997, ARMSTRONG, the defendant, established approximately eight trading accounts at Republic Securities through which he conducted trades collateralized by the assets obtained from the sale of the Princeton Notes.

c. In or about August 1998, ARMSTRONG, the defendant, and his co-conspirators, opened an account at Republic Securities in the name of PGM and caused Republic Securities to transfer funds from the Special Purpose Vehicle Accounts to the Investor Sub-Accounts.

d. From in or about September 1995 to in or about August 1999, ARMSTRONG, the defendant, and his co-conspirators, sold millions of dollars of Princeton Notes to Japanese investors and transferred the proceeds through Republic Bank to the Investor Accounts and Investor Trading Accounts at Republic Securities.

e. From in or about 1996 to in or about August 1999, ARMSTRONG, the defendant, and his co-conspirators, caused hundreds of misleading NAV Letters to be issued by Republic Securities.

f. On or about November 18, 1998, an e-mail was sent from a PEI employee to Republic Securities requesting certain NAV Letters for various Investor Accounts, specifying the specific amount of the net asset value to be confirmed, and directing that the NAV Letters include a sentence indicating that the funds in the Investor Accounts were held in "AAA Us [sic] Government Securities"

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g. In or about July 1999, ARMSTRONG, the defendant, and his co-conspirators, caused the president of Republic Securities to issue a letter, dated July 27, 1999.

h. On or about July 6, 1999, the President of Republic Securities sent an e-mail from New York, New York to the President of the Futures Division in Philadelphia, Pennsylvania.

i. On or about July 30, 1999, William H. Rogers, a co-conspirator not named herein as a defendant, in Philadelphia, Pennsylvania, spoke on the phone to another Republic Securities employee located in New York, New York.

j. On or about August 11, 1999, e-mails were sent between Republic Securities Futures Division's office in Philadelphia, Pennsylvania, and Republic Securities' office in New York, New York.

k. On or about August 16, 1999, a co-conspirator not named herein as a defendant employed in Republic Securities Futures Division's office in Philadelphia, Pennsylvania, spoke on the phone to another Republic Securities employee located in New York, New York.

(Title 18, United States Code, Section 371).

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COUNTS TWO THROUGH ELEVEN

(Securities Fraud)

The Grand Jury further charges:

72. The allegations set forth in paragraphs 1 through 63 and 70 and 71 are repeated and realleged as if set forth fully herein.

73. On or about the dates set forth below, in the Southern District of New York and elsewhere, the defendants listed below, unlawfully, willfully, and knowingly, directly and indirectly, by use of the means and instrumentalities of interstate commerce, the mails and the facilities of national securities exchanges, did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices and courses of business which operated and would operate as a fraud and deceit upon persons, in connection with the purchase and sale of securities, to wit, purchasers of the Princeton Notes, as set forth below:

COUNT	NOTE	INVESTOR	APPROX. DATE OF PURCHASE	APPROX. PURCHASE PRICE
TWO	ALG	Alps ElectricCo.	4/6/99	$16 million
THREE	AMD-4	Amada Co.	4/11/97	$31 million
FOUR	AMD-6	Amada Co.	10/2/97	$16 million
FIVE	I, a/k/a/, I-2	Gun-Ei	11/10/94	$3 million
SIX	I-8	Gun-Ei	4/23/97	$39 million
SEVEN	KSR-1	Kankaku Securities Co.	9/17/97	$4 million
EIGHT	K-5	Nichiman Europe PLC	2/18/97	$10 million

COUNT	NOTE	INVESTOR	APPROX. DATE OF PURCHASE	APPROX. PURCHASE PRICE
NINE	N-4	SMC Corp.	3/9/98	$14 million
TEN	NES-60	Nichei Securities	3/26/99	$10 million
ELEVEN	NES-64	Nichei Securities	4/6/99	$4 million

(Title 15, United States Code, Sections 78j(b) & 78ff;
Title 17, Code of Federal Regulations, Section 240.10b-5;
and Title 18, United States Code, Section 2).

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COUNTS TWELVE THROUGH TWENTY FOUR (WIRE FRAUD)

The Grand Jury further charges:

74. The allegations set forth in paragraphs 1 through 63 and 70 and 71 are repeated and realleged as if set forth fully herein.

75. From in or about 1992 to in or about September 1999, MARTIN A. ARMSTRONG, the defendant, unlawfully, willfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted by means of wire communication in interstate commerce the following writings, signs, signals, pictures and sounds, for the purpose of executing such scheme and artifice, as set forth below:

COUNT	APPROX. DATE	APPROX. AMOUNT	WIRE TRANSMISSION
TWELVE	8/25/99	$ 136 million	Facsimile communication from Republic Securities, Philadelphia, PA, to Republic Securities, New York, NY
THIRTEEN	7/30/99	$35 million	Phone Call Between William Rogers in Philadelphia, PA, and Republic Securities employee in New York, NY
FOURTEEN	8/24/99	$56,000	Funds Transfer from Republic Bank, New York, NY to Fulton Bank, PA
FIFTEEN	11/13/97	$4,027,970	Funds transfer from Bank of Tokyo-Mitsubishi, Japan, to Republic Bank, New York, NY
SIXTEEN	6/9/98	$7,078,244	Funds transfer from Bank of Tokyo-Mitsubishi, Japan, to Republic Bank, New York, NY

COUNT	APPROX. DATE	APPROX. AMOUNT	WIRE TRANSMISSION
SEVENTEEN	6/25/98	$35,544,434	Funds transfer from Bank of Tokyo-Mitsubishi, Japan, to Republic Bank, New York, NY
EIGHTEEN	10/6/98	$21,746,768	Funds transfer from Bank of Tokyo-Mitsubishi, Japan, to Republic Bank, New York, NY
NINETEEN	4/13/99	$16,509,415	Funds transfer from Citibank, Hong Kong, to Republic Bank, New York, NY
TWENTY	4/8/98	N/A	Facsimile communication from Republic Securities, New York, NY to Republic Securities, Philadelphia, PA
TWENTY ONE	8/11/99	N/A	Facsimile communication from Republic Securities Philadelphia, PA, to Republic Securities, New York, NY

COUNT	APPROX. DATE	APPROX. AMOUNT	WIRE TRANSMISSION
TWENTY TWO	8/25/99	N/A	Facsimile communication from Republic Securities Philadelphia, PA, to Republic Securities, New York, NY
TWENTY THREE	8/27/99	N/A	Two-page facsimile communication from Republic Securities Philadelphia, PA, to Republic Securities, New York, NY
TWENTY FOUR	8/27/99	N/A	One-page facsimile communication from Republic Securities Futures Division, Philadelphia, PA, to Republic Securities, New York, NY

(Title 18, United States Code, Sections 1343 and 2).

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COUNT TWENTY FIVE
(Money Laundering)

76. The allegations set forth in paragraphs 1 through 63 and 70 and 71 are repeated and realleged as if set forth fully herein.

77. From in or about July 1996 through in or about August 31, 1999, in the Southern District of New York and elsewhere, MARTIN A. ARMSTRONG, the defendant, and others known and unknown, in an offense involving and affecting interstate and foreign commerce, unlawfully, wilfully, and knowingly engaged and attempted to engage in and caused others to engage in monetary transactions in criminally derived property that was of a value greater than $10,000 and was derived from specified unlawful activity, to wit, securities fraud in violation of Title 15, United States Code, Sections 78j(b) & 78ff, Title 17, Code of Federal Regulations, Section 240.10b-5, and wire fraud in violation of Title 18, United States Code Section, 1343, in connection with the diversion of approximately $10 million of unlawful proceeds to Princeton Economics Institute.

(Title 18, United States Code, Sections 1957(a) and 2.)

SUPPLEMENTAL ALLEGATIONS TO COUNTS ONE THROUGH TWENTY FIVE

The Grand Jury further charges:

78. With respect to Counts One through Twenty Five, the loss exceeded $80,000,000.

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79. The offenses charged in Counts One through Twenty Five involved more than minimal planning and a scheme to defraud more than one victim.

80. The offenses charged in Counts One through Twenty Five involved a fraudulent scheme, a substantial part of which was committed from outside the United States, and involved sophisticated means.

81. In carrying out the offenses charged in Counts One through Twenty Five, MARTIN A. ARMSTRONG, the defendant, abused a position of private trust or used a special skill in a manner that significantly facilitated the commission or concealment of the offenses.

82. In committing the offenses charged in Counts One through Twenty Five, MARTIN A. ARMSTRONG, the defendant, was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.

83. MARTIN A. ARMSTRONG, the defendant, willfully obstructed or impeded, or attempted to obstruct or impede the administration of justice during the course of the investigation and prosecution of the offenses charged in Counts One through Twenty Five, and the obstructive conduct related to the offenses charged in Counts One through Twenty Five and relevant conduct to those offenses.

s/ Michael Cahill
FOREPERSON

s/ David N. Kelley
DAVID N. KELLEY
United States Attorney for the
Southern District of New York

APPENDIX G — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 11, 2007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 04-5448-pr(L), 05-0280-pr(CON)

MARTIN A. ARMSTRONG,

Petitioner-Appellant,

- v. -

JOSEPH R. GUCCIONE, United States Marshal for the Southern District of New York, and MARVIN D. MORRISON, Warden, Metropolitan Correctional Center,

Respondents-Appellees,

ALAN M. COHEN,

Intervenor Receiver-Appellee.

SUMMARY ORDER

Motion arising from our decision in *Armstrong v. Guccione*, 470 F.3d 89 (2d Cir.2006), affirming the orders of the United States District Court for the Southern District of New York (Richard Owen, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petitioner-appellant's motion is **GRANTED** in part and the mandate in *Armstrong* is to **ISSUE** immediately.

Appendix G

Petitioner-appellant Martin A. Armstrong moves for this court (1) to clarify that our opinion in *Armstrong* directed the district court to reassign the pending enforcement suits against him brought by the Securities and Exchange Commission, *SEC v. Princeton Econ. Int'l, Ltd.*, No. 99-Civ.-9667(RO) (S.D.N.Y. filed Sept. 13, 1999), and the Commodity Futures Trading Commission, *CFTC v. Princeton Global Mgmt., Ltd.*, No. 99-Civ.-9669(RO) (S.D.N.Y. filed Sept. 13, 1999) (together, the "Consolidated Enforcement Actions"); and (2) to order that the mandate from our decision in *Armstrong* issue immediately. We assume the parties' familiarity with the facts and procedural history of this case.

In *Armstrong*, we wrote:

> [U]nder our supervisory authority, we direct the district court, after giving reasonable notice to the parties so that they may prepare adequately, to convene as soon as practicable a new hearing into whether Armstrong is in possession of the property (or the proceeds thereof) which is the subject of the court's production order so that he is able to comply with it. Further, while we emphasize that we have never found any fault in Judge Owen's skillful handling of this case, we believe that on the seventh anniversary of Armstrong's confinement, his case deserves a fresh look by a different pair of eyes. We therefore direct the district court to reassign the case randomly to a different district court judge on remand.

Armstrong, 470 F.3d at 113.

By the foregoing language, we intended, in the exercise of our supervisory authority, to convey our belief that the transfer of the Consolidated Enforcement Actions to a different district court judge would be advisable in the interests of justice.

The Government has raised the issue of whether our supervisory authority permits us to reassign the Consolidated Enforcement Actions in the district court when only the habeas petition and motion for bail, and not the Consolidated Enforcement Actions, are before us. Because it was our intention to convey our belief that such a transfer of the Consolidated Enforcement Actions was advisable, we are confident that the district court will honor that intention without our addressing the question of our authority to order it. *Cf. In re Daimler Chrysler Corp.*, 294 F.3d 697, 700-01 (5th Cir.2002); *Hamilton v. Morial*, 644 F.2d 351, 354 & n. 1 (5th Cir. Apr. 1981) (per curiam); *Poteet v. Fauver*, 517 F.2d 393, 398 (3d Cir.1975) (dictum). The parties are directed to advise this court of whatever actions are taken with respect to the reassignment of the Consolidated Enforcement Actions. In the meantime, Armstrong's motion to clarify our opinion in *Armstrong* with respect to reassignment will be held in abeyance.

With respect to the second part of Armstrong's motion, the mandate in *Armstrong v. Guccione*, 470 F.3d 89 (2d Cir.2006), shall issue forthwith.

For the foregoing reasons, the petitioner-appellant's motion is **GRANTED** in part and the mandate in *Armstrong* is to **ISSUE** immediately.

FOR THE COURT:
Thomas W. Asreen, Acting Clerk
By: _____
Lucille Carr, Deputy Clerk

(3)

No. 06-1278

In the Supreme Court of the United States

MARTIN A. ARMSTRONG, PETITIONER

v.

JOSEPH R. GUCCIONE, UNI 'ED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's confinement for civil contempt, based on his refusal as a corporate custodian to surrender property belonging to the corporation, violated the "Recalcitrant Witness Statute," 28 U.S.C. 1826.

2. Whether petitioner's confinement for civil contempt violated the "Non-Detention Act," 18 U.S.C. 4001(a).

3. Whether petitioner's confinement for civil contempt violated the Due Process Clause of the Fifth Amendment.

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In the Supreme Court of the United States

No. 06-1278

MARTIN A. ARMSTRONG, PETITIONER

v.

JOSEPH R. GUCCIONE, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 470 F.3d 89. The opinion and order of the district court (Pet. App. 55a-74a) is reported at 351 F. Supp. 2d 167.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2006. On February 21, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 19, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) filed civil enforcement actions in the United States District Court for the Southern District of New York against petitioner and companies he controlled, contending that they violated various provisions of the federal securities and commodities laws. In the course of those proceedings, the district court held petitioner in civil contempt for failing to return missing corporate assets and records to a court-appointed receiver. Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241. The district court denied the petition, Pet. App. 55a-74a, and the court of appeals affirmed, *id.* at 1a-54a.

1. In the late 1990s, petitioner allegedly persuaded Japanese investors to invest approximately $3 billion in various companies that he controlled. Petitioner was supposed to use the money to invest in United States securities or futures instruments, while hedging against any exchange-rate risk. Instead, petitioner used the money to engage in risky and speculative trading and for other purposes. Petitioner then sought to hide losses from that trading by presenting false account statements and confirmations to the investors. Over time, the fraudulent investment program turned into a massive pyramid scheme, as petitioner used new investments to pay off old investors and mask the growing losses. In all, those losses totaled nearly $1 billion. Pet. App. 3a-4a, 90a-111a.

2. On September 13, 1999, the SEC and CFTC filed civil enforcement actions in the United States District Court for the Southern District of New York against petitioner and companies he controlled, contending that

they violated various provisions of the federal securities laws. Pet. App. 4a. A grand jury in the Southern District of New York later returned a superseding indictment charging petitioner with 25 counts of securities fraud, wire fraud, conspiracy, and money laundering. *Id.* at 112a-159a.

The SEC and CFTC moved for temporary restraining orders, seeking to freeze the assets of petitioner's companies and to have a receiver appointed to recover corporate assets and records from petitioner and the companies. The district court granted the motions and subsequently converted the temporary restraining orders into preliminary injunctions. Pursuant to the court's orders, the receiver then sought to recover some $16 million in corporate assets (including rare coins, gold bars, and various antiquities), together with corporate records, from petitioner. After petitioner failed to comply, the receiver moved for an order holding petitioner in contempt; petitioner contended that compliance with the court's orders would violate his Fifth Amendment privilege against self-incrimination. Petitioner subsequently returned some of the items, but failed to return approximately $15 million of the assets, along with a missing computer and hard drive. On January 14, 2000, after a hearing at which the receiver produced evidence that the remaining items were still in petitioner's possession (and also produced evidence that files had been erased from other hard drives that petitioner had handed over), the district court held petitioner in civil contempt and remanded him to custody. Pet. App. 4a-8a.

The district court subsequently conducted periodic hearings at which petitioner was given opportunities either to comply with the orders or to demonstrate that

it would have been impossible for him to do so. The district court repeatedly concluded that petitioner's continued detention was appropriate; petitioner repeatedly sought to appeal, but the court of appeals, after briefing and oral argument, dismissed those appeals on the ground that they were interlocutory (and the court therefore lacked jurisdiction). Pet. App. 8a-9a.

3. In 2004, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, contending that his confinement for civil contempt violated his Fifth Amendment privilege against self-incrimination and that the district court lacked the authority to continue to confine him for civil contempt. The district court denied the petition. Pet. App. 55a-74a. The court first reasoned that, under *Braswell* v. *United States*, 487 U.S. 99 (1988), "no use can be made of the fact of a simple turnover of corporate assets by a corporate officer," and the court's orders thus did not implicate the Fifth Amendment privilege against self-incrimination. Pet. App. 68a. The court then summarily rejected petitioner's contentions that he could not be confined under the "Recalcitrant Witness Statute," 28 U.S.C. 1826, or the "Non-Detention Act," 18 U.S.C. 4001(a). Pet. App. 68a & n.10.

4. The court of appeals affirmed. Pet. App. 1a-54a.

a. The court of appeals first held that petitioner's confinement for civil contempt did not violate his Fifth Amendment privilege against self-incrimination. Pet. App. 12a-19a. The court of appeals agreed with the district court that "*Braswell* controls here" and that, as a corporate custodian in possession of corporate assets and records, petitioner "cannot escape production by relying on the Fifth Amendment." *Id.* at 13a.

As is relevant here, the court of appeals then held that the district court possessed the authority to con-

tinue to detain petitioner for civil contempt. Pet. App. 20a-48a. With regard to the "Non-Detention Act," the court noted at the outset that the statute provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Id.* at 25a (quoting 18 U.S.C. 4001(a)). The court reasoned that, even "[a]ssuming that the Non-Detention Act has any application to coercive confinement in the face of a finding of civil contempt," its requirement of congressional authorization for detention was satisfied both by the statutes creating the federal courts (which "implicitly vested" those courts with "[t]he power to confine to coerce compliance with court orders") and by 18 U.S.C. 401 (2000 & Supp. IV 2004), which "should be understood to authorize imprisonment on findings of both civil and criminal contempt." Pet. App. 25a-26a.

With regard to the "Recalcitrant Witness Statute," the court explained that the statute authorizes a court to confine a "witness" who "refuses without just cause shown to comply with an order of the court to testify or provide other information" for only 18 months. Pet. App. 37a-38a (quoting 28 U.S.C. 1826(a)). The court concluded, however, that the statute was inapplicable on the ground that, as a custodian of corporate property covered by *Braswell*, petitioner was not a "witness" for purposes of the statute. *Id.* at 38a-39a. The court further reasoned that, even if petitioner were a "witness," he would not be entitled to invoke the statute because "[a]n order requiring the production of money or valuable property, for the purpose of restoring it to its rightful owner, is not an order to provide 'information.'" *Id.* at 41a.

Finally, with regard to petitioner's claim that his continued confinement violated the Due Process Clause

of the Fifth Amendment (which the district court had not addressed), the court of appeals reasoned that "[t]he length of coercive incarceration, in and of itself, is not dispositive of its lawfulness." Pet. App. 42a. Instead, the court explained, "[c]ivil confinement only becomes punitive when it loses the ability to secure compliance." *Ibid.* The court rejected petitioner's contention that, "upon the passage of some specific period of coercive imprisonment that fails to induce compliance, an inference must be drawn of an inability to comply." *Id.* at 44a. The court reasoned that "there is a crucial difference between one who is capable of complying and refuses to do so and one who is not capable of complying," and concluded that contemnors who are unable to comply and contemnors who are unwilling to comply "should not be treated similarly in divining the line between coercive and punitive sanctions.'" *Id.* at 44a n.9 (internal quotation marks and citation omitted). The court of appeals recognized, however, that an individual held in civil contempt who "claims * * * to be incapable of complying with the court's order" is entitled to have the court periodically "reconsider, regardless of past findings, whether the person is presently capable of complying." *Id.* at 47a-48a. After assigning a different judge to the case, the court of appeals therefore asked the district court to convene a new hearing on whether petitioner was able to comply with the court's production orders. *Id.* at 48a, 162a.

b. Judge Sotomayor concurred. Pet. App. 49a-54a. While she concluded that the district court's contempt sanction was valid, she expressed the view that "the eighteen-month maximum duration imposed on a civil contempt sanction by the Recalcitrant Witness Statute should be a presumptive benchmark for all civil con-

tempt incarcerations." *Id.* at 49a. She agreed that "the district court should undertake soon to revisit whether [petitioner's] imprisonment has slipped into the impermissible terrain of a punitive sanction." *Ibid.*

5. On April 27, 2007, the district court, after conducting a hearing, terminated petitioner's confinement for civil contempt, on the ground that the confinement was no longer coercive. Pet. Supp. Br. 1. While petitioner's appeal was pending, he pleaded guilty to the conspiracy charge in the criminal case. Pet. App. 10a. On April 10, 2007, he was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Pet. Supp. Br. 1. Petitioner is currently serving that sentence.

ARGUMENT

Petitioner renews his claims (Pet. 8-29) that his confinement for civil contempt violated the "Recalcitrant Witness Statute," 28 U.S.C. 1826; the "Non-Detention Act," 18 U.S.C. 4001(a); and the Due Process Clause of the Fifth Amendment. The court of appeals' decision with regard to each of those claims is correct and does not conflict with any decision of this Court or of another court of appeals. In addition, because petitioner's confinement for civil contempt has now terminated, this case would be a poor vehicle for considering those claims. Further review is therefore unwarranted.

1. Petitioner first contends (Pet. 10-14) that his confinement for civil contempt violated the "Recalcitrant Witness Statute," 28 U.S.C. 1826. Subsection (a) of that statute provides that, when a "witness" in a federal judicial proceeding "refuses without just cause shown to comply with an order of the court to testify or provide other information," the witness may be confined "until

such time as the witness is willing to give such testimony or provide such information," but "in no event shall such confinement exceed eighteen months." Section 1826(a) is inapplicable here because it applies only to "witness[es]" who refuse to testify or "provide * * * information" in federal judicial proceedings—not to corporate custodians who refuse to return property belonging to their corporations. See, *e.g.*, *Gelbard* v. *United States*, 408 U.S. 41, 73 (1972) (Rehnquist, J., dissenting) (noting that Section 1826(a) "resulted from a desire on the part of Congress to treat separately from the general contempt power of courts their authority to deal with recalcitrant witnesses in court or grand jury proceedings").

a. Petitioner contends (Pet. 11-12) that the court of appeals erred by holding that he was not a "witness" for purposes of Section 1826(a) because his compliance with the order to produce property would not constitute a testimonial communication for purposes of the Fifth Amendment privilege against self-incrimination. But the court of appeals did not so hold; rather, it simply (and correctly) explained that petitioner's argument that he *was* protected by the Fifth Amendment was incorrect because corporate custodians cannot invoke the Fifth Amendment to resist the production of corporate property. Pet. App. 38a-39a (discussing *Braswell* v. *United States*, 487 U.S. 99 (1988)).[1] And petitioner ultimately

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[1] This Court's decision in *United States* v. *Hubbell*, 530 U.S. 27 (2000), on which petitioner relies (Pet. 11-12), is not to the contrary. It merely reiterates the principle that a criminal defendant can invoke the Fifth Amendment privilege in response to a subpoena to produce documents to a grand jury, on the ground that "the act of producing documents in response to a subpoena may have a compelled testimonial aspect" (by "communicat[ing] information about the existence, custody,

concedes (Pet. 13) that "the application of Section 1826 does not turn on whether a person is a witness under the Fifth Amendment."

The linchpin of the court of appeals' analysis of the statute was that, even if petitioner constituted a "witness," the relevant order did not constitute an order to "provide other information" under Section 1826(a), insofar as it sought the return of *assets* (*viz.*, rare coins, gold bars, and various antiquities). Pet. App. 39a-41a. That conclusion is correct, because the items at issue possessed no independent informational value (and thus could not constitute "information" in any sense of the term). Petitioner cites no case holding that similar items of property qualify as "information" for purposes of Section 1826(a). While petitioner relies (Pet. 13) on *Palmer* v. *United States*, 530 F.2d 787 (8th Cir. 1976) (per curiam), that case merely quotes legislative history for the proposition that the phrase "other information" in Section 1826(a) was intended to cover "*all* information given as testimony," including information that is electronically stored on computer tapes or in another medium. *Id.* at 789 n.3 (emphasis added; citation omitted). It does not stand for the broader proposition that "other information" covers any item of property, even if the item possesses no independent informational value.

b. Petitioner contends (Pet. 12-13) that the court of appeals' decision conflicts with the decisions of other courts of appeals. As the court of appeals explained (Pet. App. 40a-41a), however, the cases cited by petitioner are readily distinguishable on their facts, because they involved witnesses who refused to provide hand-

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and authenticity of the documents"). 530 U.S. at 36. As the court of appeals explained, *Hubbell* "did not disturb *Braswell*'s holding with respect to custodians of corporate property." Pet. App. 39a.

writing or voice exemplars—not corporate custodians who refused to return property belonging to their corporations. See *In re Grand Jury Proceedings*, 567 F.2d 281, 282-283 (5th Cir. 1978) (voice exemplars); *United States* v. *Mitchell*, 556 F.2d 371, 384-385 (6th Cir.) (voice exemplars), cert. denied, 434 U.S. 925 (1977); *Palmer*, 530 F.2d at 789 (handwriting exemplars); *In re Lopreato*, 511 F.2d 1150, 1153-1154 (1st Cir. 1975) (handwriting exemplars). Those cases, with which the Second Circuit did not disagree, involved refusals to supply evidence sought for its informational value alone. Here, regardless whether the items sought might have an evidentiary use (as petitioner contends, see Pet. 13-14), they were sought by the receiver because they were "objects of monetary value that are the property of the corporation in receivership." Pet. App. 41a. Because petitioner identifies no case holding that Section 1826(a) is applicable to corporate custodians who refuse to return property belonging to their corporations, petitioner fails to establish the existence of a valid circuit conflict.

2. Petitioner next contends (Pet. 14-20) that his confinement for civil contempt violated the "Non-Detention Act," 18 U.S.C. 4001(a). Petitioner does not contend, however, that the court of appeals' decision in that respect conflicts with any decision of another court of appeals, and his claim of error in the court of appeals' decision lacks merit.

a. Section 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Petitioner asserts (Pet. 15) that 28 U.S.C. 1826(a) is "[t]he only statute that contains the requisite clear and specific grant of authority to imprison civil contemnors" and that, because he was confined for longer than the 18 months

permitted by that statute, he was held in violation of Section 4001(a).

As a preliminary matter, petitioner's argument plainly lacks merit because it would mean that courts lack the power to detain a person in order to coerce compliance with a lawful order unless the person qualifies as a "witness" who is refusing to "testify or provide other information" for purposes of 28 U.S.C. 1826(a). It is well established that courts possess broad inherent power to impose contempt sanctions, even against individuals who do not qualify as recalcitrant witnesses under any conceivable reading of 28 U.S.C. 1826(a). See, *e.g.*, *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980); *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821). Petitioner cites no authority for the novel proposition that Congress intended Section 4001(a) to "abrogat[e] the inferior courts' inherent power to incarcerate civil contemnors," Pet. 17, and leave 28 U.S.C. 1826(a) as the exclusive basis for imposing civil contempt sanctions.[2]

b. In any event, the court of appeals correctly held that, "[a]ssuming that the Non-Detention Act has any application to coercive confinement in the face of a finding of civil contempt," Pet. App. 25a-26a, there were two

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[2] The legislative history of Section 4001(a) confirms that it was not intended to limit a federal court's ability to impose contempt sanctions. See, *e.g.*, 117 Cong. Rec. 31,541 (1971) (statement of Rep. Poff) (noting that "[i]t is not the Committee's intent to eliminate any detention practices presently authorized by statute or judicial practice and procedure" and that "[d]etentions incident to judicial administration such as those authorized by * * * judicial contempt powers * * * are not within the intendment of the committee's amendment [adding Section 4001(a)]").

other sources for the authority to confine individuals for civil contempt. *Id.* at 25a-37a. First, the court of appeals held that Section 4001(a)'s requirement of congressional authorization was satisfied by the statutes creating the federal courts, which "implicitly vested" those courts with "[t]he power to confine to coerce compliance with court orders." *Id.* at 26a. The court of appeals correctly so held, because it is well settled not only that federal courts have the inherent power to impose contempt sanctions, but that the contempt power is a product of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, which created the lower federal courts and thereby vested them with the judicial power authorized by Article III of the Constitution. See, *e.g.*, *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874) (noting that "[t]he moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of th[e] power [to impose contempt sanctions]"); *Anderson*, 19 U.S. (6 Wheat.) at 227 (stating that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with the power to impose * * * submission to their lawful mandates"). Although petitioner contends (Pet. 16) that the statutes creating the federal courts are insufficient because Section 4001(a) requires "a precise and specific grant of congressional authority," nothing in the terms of Section 4001(a) provides that the relevant "Act of Congress" must *explicitly* authorize the detention at issue.

Second, the court of appeals held that, even assuming that Section 4001(a)'s requirement of congressional authorization was not satisfied by the statutes creating the federal courts, it was satisfied by 18 U.S.C. 401 (2000 & Supp. IV 2004), which expressly provides that "[a] court

of the United States shall have power to punish * * * such contempt of its authority * * * as * * * [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." Petitioner contends (Pet. 17-20) that Section 401 is inapposite because it authorizes only criminal, and not civil, contempt sanctions. Although Section 401 uses the term "punish," however, it does so only in a generic sense relating to confinement, not in a more specific sense limited to confinement for criminal contempt. As the court of appeals noted, "throughout the history of § 401's predecessor statutes, the term 'punish' has been used indiscriminately to refer to civil and criminal contempt sanctions alike." Pet. App. 37a; see, *e.g.*, *Lamb* v. *Cramer*, 285 U.S. 217, 220 (1932) (so using "punish"); *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911) (same). Accordingly, lower courts have consistently concluded that Section 401 authorizes civil, as well as criminal, contempt sanctions. See, *e.g.*, *Britton* v. *Co-op Banking Group*, 916 F.2d 1405, 1409 n.4 (9th Cir. 1990); *Mitchell*, 556 F.2d at 384; *United States ex rel. Shell Oil Co.* v. *Barco Corp.*, 430 F.2d 998, 1000 (8th Cir. 1970). Petitioner seemingly concedes (Pet. 18 n.12) that there is no circuit conflict on that question, and the court of appeals' holding that Section 4001(a)'s requirement of congressional authorization was satisfied by Section 401 (and also by the statutes creating the federal courts) thus does not merit further review.

3. Petitioner further contends (Pet. 21-29) that his confinement for civil contempt violated the Due Process Clause of the Fifth Amendment. That contention also lacks merit.

a. As the court of appeals explained, confinement for civil contempt does not violate due process simply by

virtue of its duration. See Pet. App. 42a. This Court has stated that "the paradigmatic coercive, civil contempt sanction * * * involves confining a contemnor *indefinitely* until he complies with an affirmative command[,] such as an order * * * to surrender property ordered to be turned over to a receiver." *United Mine Workers* v. *Bagwell*, 512 U.S. 821, 828 (1994) (emphasis added; internal quotation marks and citation omitted); see *Chadwick* v. *Janecka*, 312 F.3d 597, 608 (3d Cir. 2002) (Alito, J.) (noting that "*Bagwell* seems to permit a contemnor who has the ability to comply with the underlying court order to be confined until he or she complies"), cert. denied, 538 U.S. 1000 (2003).

If confinement for civil contempt does become punitive rather than coercive, continued confinement would violate due process. Confinement becomes punitive where a contemnor demonstrates an inability to comply with the relevant order. See, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 761 (1983); *Maggio* v. *Zeitz*, 333 U.S. 56, 74 (1948). In this case, however, both lower courts found that petitioner had failed to demonstrate an inability to comply. See, *e.g.*, Pet. App. 44a n.8 (court of appeals) (concluding that petitioner "has never made a serious effort to demonstrate that compliance is impossible"); *id.* at 68a (district court) (noting that petitioner has repeatedly "not challenge[d] the finding that he has the ability to turn over the assets"). Petitioner provides no support for his contention that, "after some period of confinement, the contemnor's claim of inability to comply *must* be credited." Pet. 21 (emphasis added). While a contemnor's failure to comply for a lengthy period may suggest that the contemnor is unable to comply, see, *e.g.*, *Maggio*, 333 U.S. at 76; *Chadwick*, 312 F.3d at 612 (noting that, "in most cases, after a certain period, the infer-

ence that the contemnor is unable to comply becomes overwhelming"), the lower courts correctly discounted that fact here, both in light of the significant sum of money that petitioner stood to gain by defying the court's orders, see Pet. App. 43a, and in light of the "scant evidence" that petitioner presented to support his claim that he was unable to comply. *Id.* at 7a. The lower courts' fact-bound conclusion that petitioner had failed to demonstrate an inability to comply does not warrant further review.

b. Petitioner alternatively contends (Pet. 25-29) that the courts of appeals are divided on whether confinement for civil contempt becomes punitive where the contemnor demonstrates a "substantial likelihood" that he will not comply, even if he is able to do so. It is true that some courts of appeals (including the Second Circuit in a previous case) have held that confinement can become punitive if there is no "substantial likelihood" (or "reasonable possibility") that the contemnor will comply with the relevant order. See *United States* v. *Lippitt*, 180 F.3d 873, 877-879 (7th Cir.), cert. denied, 528 U.S. 958 (1999); *CFTC* v. *Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1530-1531 (11th Cir.), cert. denied, 506 U.S. 819 (1992); *Simkin* v. *United States*, 715 F.2d 34, 37 (2d Cir. 1983); *In re Grand Jury Investigation*, 600 F.2d 420, 424-425 (3d Cir. 1979); *Lambert* v. *Montana*, 545 F.2d 87, 91 (9th Cir. 1976); but cf. *Chadwick*, 312 F.3d at 613 (noting that this Court "has never endorsed the proposition that confinement for civil contempt must cease when there is 'no substantial likelihood of compliance'").

The court of appeals' decision in this case, however, does not conflict with those decisions. Although the court of appeals reasoned that "there is a crucial differ-

ence between one who is capable of complying and refuses to do so and one who is not capable of complying," Pet. App. 44a n.9, it stopped short of holding that confinement for civil contempt could *never* become punitive where the contemnor is simply unwilling to comply with the relevant order. Instead, it concluded only that contemnors who are unable to comply and contemnors who are unwilling to comply "should not be treated similarly in 'divining the line between coercive and punitive sanctions.'" *Ibid.* The court of appeals further made clear that the district court should conduct periodic hearings to determine whether petitioner's confinement had become punitive. See, *e.g.*, *id.* at 8a, 44a; *id.* at 52a-53a (Sotomayor, J., concurring). The court of appeals' decision thus does not meaningfully differ from the decisions cited by petitioner. See, *e.g.*, *Lippitt*, 180 F.3d at 878-879 (noting that when confinement for civil contempt becomes punitive depends on the facts of the case and is committed to the discretion of the district court); *Simkin*, 715 F.2d at 37 (noting that, "[a]s long as the judge is satisfied that the coercive sanction might yet produce its intended result, the confinement may continue"). Indeed, in proceedings following the court of appeals' decision, the district court terminated petitioner's confinement for civil contempt on the ground that there was no "realistic possibility" that he would comply with the underlying orders (and petitioner's confinement had therefore become punitive). See Pet. Supp. Br. 1; 4/27/07 Tr. 99. The district court's reasoning confirms that the court of appeals' decision does not conflict with decisions adopting a "substantial likelihood" (or "reasonable probability") standard.

4. Finally, because the district court has since terminated petitioner's confinement for civil contempt, this

case constitutes a poor vehicle for consideration of the questions presented. Even assuming that the district court's decision does not render the case moot (on the theory that petitioner might be able to receive credit toward his criminal sentence for at least some period of his confinement, if it were unlawful), it suggests that the disposition of the questions presented is of limited practical significance in this case, because it is far from clear whether resolution of any of petitioner's claims in his favor would significantly affect his criminal sentence. At a minimum, the Court may prefer to consider the questions presented in a case involving a civil contemnor who remains confined.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT ALAN M. COHEN IN OPPOSITION

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IN THE

Supreme Court of the United States

No. 06-1278

MARTIN A. ARMSTRONG,
Petitioner,

v.

JOSEPH R. GUCCIONE, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, MARVIN D. MORRISON, WARDEN, METROPOLITAN CORRECTIONAL CENTER, AND ALAN M. COHEN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT ALAN M. COHEN IN OPPOSITION

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1. Petitioner Martin A. Armstrong was held in civil contempt for refusing to comply with judicial orders requiring him to turn over certain corporate assets that he was found to hold as corporate custodian. He challenged his confinement on various bases, all of which were rejected by the district court on habeas review and by the U.S. Court of Appeal for the Second Circuit on appeal. Following its review, however, the court of appeal directed the district court to conduct another hearing to determine whether the confinement order remained coercive. On April 27, 2007, at the conclusion of

the evidentiary hearing (and after Armstrong filed a petition for a writ of certiorari), the district court terminated Armstrong's civil confinement, ruling that it could not find that the confinement was likely to continue to have coercive effect. Pet'r Supp. Br. 1. On April 10, 2007, Armstrong pleaded guilty to a criminal offense. He is now serving a 60 month sentence. *Id.*

2. Respondent Alan M. Cohen is the receiver for the companies Armstrong defrauded. Respondent Cohen initiated the civil contempt proceedings to compel production of corporate assets in Armstrong's possession and control as the corporate custodian of the companies in receivership. Pet. 3.

3. Armstrong's petition for a writ of certiorari is meritless and should be denied. The Brief for the Federal Respondents in Opposition (filed August 24, 2007), amply sets forth the reasons certiorari is not warranted here. As the federal respondents' submission demonstrates, the decision below (a) implicates no conflict among the circuits; (b) correctly resolves all the questions presented; and (c) presents a poor vehicle for review because Armstrong's confinement has been terminated. Fed. Opp'n Br. 7-17. Respondent Cohen agrees with and hereby adopts the reasons given by the federal respondents for opposing certiorari in this case.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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Pursuant to Supreme Court Rule 15.8, and in response to an inquiry by the Clerk of this Court as to the possible mootness *vel non* of his petition for a writ of certiorari, petitioner Martin A. Armstrong (Armstrong) respectfully submits this supplemental brief.[1] As explained herein, Armstrong's petition is not moot. Indeed, Armstrong's constitutional and statutory challenges to his more than seven years' imprisonment for civil contempt are controversies that remain very much alive and in need of resolution by this Court.

Since Armstrong's petition was filed on March 19, 2007, there have been two new developments in the district court proceedings to which Armstrong is a party. First, on April 10, 2007, Armstrong was sentenced to sixty months' imprisonment for his criminal conviction. Over Armstrong's objection, the sentencing judge ordered that the criminal sentence would not commence until his civil contempt case ended. The sentencing judge also ordered that Armstrong would receive no credit against his criminal sentence for any time he already had served for civil contempt.

Second, on April 27, 2007, the district judge who was reassigned the civil enforcement actions convened a new hearing on Armstrong's civil contempt. At the conclusion of the hearing, the court discontinued Armstrong's confinement for civil contempt based on its determination that continued incarceration would no longer have any coercive effect. The district judge also ordered Armstrong to begin serving his criminal sentence, in accordance with the judgment previously entered by the criminal sentencing judge.

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[1] Part IV of Armstrong's petition argued that several pending district court proceedings would not moot his case. Now that those proceedings have concluded, this brief updates and supplements Armstrong's previous arguments.

I. The Petition Is Not Moot Because The Contempt Proceeding Delayed Commencement Of The Criminal Sentence That Armstrong Is Presently Serving.

As a matter of Article III jurisdiction, this case is plainly not moot. Armstrong's confinement for civil contempt – the length of which he challenges on constitutional and statutory grounds – delayed the start of his criminal sentence. As a result, the legality of the civil confinement remains a live case or controversy.

It is settled law that when a term of civil confinement delays or interrupts a pending criminal sentence, any challenge to the contempt sanction is not moot, even after the contempt order is vacated. *See, e.g., In re Altro*, 180 F.3d 372, 375 n.3 (2d Cir. 1999); *Mosley v. United States*, No. 92-1263, 1994 WL 246077, at *1 (7th Cir. June 3, 1994) (unpublished order); *In re Grand Jury Proceedings*, 588 F.2d 429, 429 (5th Cir. 1979) (per curiam); *Bruno v. Greenlee*, 569 F.2d 775, 776 n.2 (3d Cir. 1978) (per curiam). Furthermore, if some period of the civil confinement is later held to have been unlawful, the contemnor must receive credit at least for the length of time that it tolled his criminal sentence. *See In re Altro*, 180 F.3d at 375 n.3; *In re Grand Jury Proceedings*, 541 F.2d 464, 464 (5th Cir. 1976) (per curiam) (holding that civil contemnor held beyond expiration of grand jury would receive credit against even an *unrelated* criminal sentence that was interrupted by his civil incarceration). The possibility of receiving credit against the criminal sentence gives the contemnor a "personal stake in the outcome" of the litigation that satisfies constitutional requirements of justiciability. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (citation omitted). These principles hold equally true where the prisoner challenges an already-completed period of civil contempt – as here – through a habeas action under 28 U.S.C. § 2241. *See Bruno*, 569 F.2d at 776 & n.2.

Although Armstrong was sentenced on April 10, 2007, his sentence did not begin to run until the civil contempt ended seventeen days later on April 27, 2007. If this Court were to determine that any portion of Armstrong's confinement for civil contempt was invalid for any of the reasons advanced in his petition, he would be entitled to credit, at a minimum, for the intervening days between April 10 and April 27. However short, the length of that delay is not material to the justiciability of the case. Because the contempt sanction caused the criminal sentence to end "later than it would have ended if there had been no [delay]," *id.*, Armstrong's challenge to his civil confinement is not moot.

II. The Petition Is Not Moot Because Armstrong Would Be Entitled To Credit Toward The Completion Of His Criminal Sentence For *Any* Period Of His Civil Incarceration That This Court Held Was Unlawful.

This case is also not moot because a live controversy remains as to whether Armstrong should receive credit for all or most of the time period that he was unlawfully imprisoned for civil contempt prior to imposition of his criminal sentence. Armstrong was incarcerated for over seven years prior to commencement of his criminal sentence – five and one-half years more than the maximum eighteen months allowed by the Recalcitrant Witness Statute, 28 U.S.C. § 1826(a). Reversal of the Second Circuit's decision would thus entitle him to immediate release from the five-year sentence he is serving.

In the one analogous case of which we are aware, the Sixth Circuit held that two civil contemnors, who were unlawfully imprisoned beyond Section 1826(a)'s maximum eighteen months, were entitled to credit for the excess time toward the completion of their subsequently-imposed criminal sentences. *See United States v. Mitchell*, 556 F.2d 371, 385 (6th Cir. 1977).

Similarly, Armstrong contends that his civil contempt sanction was governed by Section 1826(a) and the Non-Detention Act, 18 U.S.C. § 4001(a), and thus his imprisonment for civil contempt should have ended in July 2001 and not gone beyond eighteen months. The petition also challenges the duration of his confinement on constitutional grounds, arguing that it violated the Due Process Clause. Even though Armstrong's confinement for civil contempt has ended, a live controversy remains as to whether he should receive credit for the unlawful period of civil confinement that he served prior to his criminal sentencing – which, at a minimum, exceeded five and one-half years.

It is therefore critical that this Court grant certiorari and reverse the Second Circuit's decision below – which defies controlling constitutional and statutory principles and is inconsistent with the decisions of other circuit courts – so that Armstrong can receive credit against his criminal sentence for the period that he was unlawfully imprisoned and qualify him for immediate release.

Accordingly, the petition is not moot.

CONCLUSION

The petition for a writ of certiorari should be granted.

May 11, 2007

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I. The Recalcitrant Witness Statute Applies To Corporate Custodians Who Refuse To Produce Incriminating Evidence Against Themselves.

Respondents are simply wrong in claiming that the Recalcitrant Witness Statute is inapplicable "to corporate custodians who refuse to return property belonging to their corporations." Opp. 8. As explained in the Petition, Section 1826's application to custodians is demonstrated by *Braswell v. United States*, 487 U.S. 99 (1988), this Court's landmark decision on the corporate custodian doctrine, *which was itself a Section 1826 case*. Pet. 12. After *Braswell*, the circuits also have applied Section 1826 to corporate custodians. *See, e.g., In re Grand Jury Subpoena Dated Nov. 12, 1991*, 957 F.2d 807 (11th Cir. 1992) (per curiam). Respondents' assertion cannot be correct because it would lead to the absurd result that corporate officers could be held forever while all other witnesses would have to be released after eighteen months.[1]

Respondents also mistakenly believe that then-Justice Rehnquist's dissenting opinion in *Gelbard v. United States*, 408 U.S. 41, 73 (1972) (Rehnquist, J., dissenting), a case that did not even involve corporate custodians, helps their contention that Section 1826 does not apply to corporate custodians. Opp. 8. In fact, Justice Rehnquist's dissent in *Gelbard* provides persuasive reasoning why corporate custodians *are* protected by the Recalcitrant Witness Statute. Noting that Congress enacted Section 1826 to "codify present [civil contempt] practice" in federal courts, 408 U.S. at 73, 75 (quoting S. Rep. No. 91-617, at 148 (1969)), Justice Rehnquist reasoned that contempt practices that existed prior to Section 1826's enactment are instructive in identifying classes of contemnors to whom

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1. The District Court (that heard Armstrong's habeas petition) acknowledged, and Respondents effectively concede, that Armstrong was a "witness" under the Recalcitrant Witness Statute, and the Second Circuit did not hold to the contrary. Opp. 8-9. Because the parties are in agreement on this issue, there is no further need to address it.

Congress intended the statute to apply, an approach this Court later endorsed in *United States v. Euge*, 444 U.S. 707, 718 n.14 (1980). Judicial contempt practice prior to the passage of Section 1826 included the power to coercively detain corporate custodians. *See, e.g., Penfield v. SEC*, 330 U.S. 585 (1947); *Boren v. Tucker*, 239 F.2d 767 (9th Cir. 1956); *Fenton v. Walling*, 139 F.2d 608 (9th Cir. 1943). Justice Rehnquist's reasoning thus supports the conclusion that Congress intended the statute to apply to corporate custodians.

Respondents fail in their efforts to disavow the clear conflict between the decision below and decisions by other circuits that properly have construed the words "other information" in Section 1826 broadly to include non-communicative, tangible things – *e.g.*, hair, voice recordings, handwriting samples – that could be used against criminal defendants.[2] *First*, Respondents contend that cases from other circuits are distinguishable because these corporate assets – unlike hair, voice and handwriting samples – possessed no "independent informational value." Opp. 9. But that claimed distinction fails on several grounds, the most obvious of which is that "independent informational value" is *not* a requirement of Section 1826: it is a fiction of Respondents' own creation. This phrase appears nowhere in the statute and Respondents cite no case holding that Section 1826 is limited to items with "independent informational value."

Moreover, Respondents' construction of the statutory phrase "other information" would lead to absurd results because it would deny the protections of Section 1826 to witnesses ordered to produce many kinds of evidence for use in a civil or criminal case. Under Respondents' reading, a witness who violated an order to return, say, a prized stallion that a compatriot was charged with having stolen would not be considered a

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2. *In re Lopreato*, 511 F.2d 1150 (1st Cir. 1975); *In re Grand Jury Proceedings*, 567 F.2d 281 (5th Cir. 1978); *United States v. Mitchell*, 556 F.2d 371, 384 (6th Cir. 1977); *Palmer v. United States*, 530 F.2d 787 (8th Cir. 1976) (per curiam).

recalcitrant witness because, according to Respondents, the horse itself "could not constitute 'information' in any sense of the term." Opp. 9. But the stolen horse is probably one of the *most* important pieces of evidence the witness could provide, perhaps even more than his own testimony. *See* 7 J.H. Wigmore, Evidence § 2129, at 704 (Chadbourn rev. 1978). It is hornbook law that one of the common law "testimonial" obligations or evidentiary duties of witnesses was to provide physical objects – such as a horse, or gold bars – that had evidentiary or informational value. *See id.* Section 1826's use of the words "testify" and "provide other information" codified this duty, which applies "to *every form and material of evidence whatever.*" Wigmore, Evidence § 2193, at 74 (emphasis in original); *see also United States v. Euge*, 444 U.S. 707, 712 nn.5-7 (1980); *Palmer v. United States*, 530 F.2d 787, 789 & n.3 (8th Cir. 1976) (per curiam).

It would be fatuous to conclude that the stolen horse in the example above would not qualify as "other information" in Section 1826 – yet, Respondents' misreading of the statute would compel that very result. The absurdity of Respondents' position is equally manifest here, where the assets that Armstrong was ordered to produce were the *very same items* that he was charged in a parallel criminal proceeding with having allegedly purloined by fraud. The items unquestionably would have provided highly probative evidence and information that would have been used against him. Section 1826 thus applied to them.

Respondents also ignore that Section 1826's language is broad enough to encompass the assets in this case. Consistent with its codification of a broad common-law "testimonial" or evidentiary duty imposed on witnesses, Section 1826 provides that "other information" includes "any book, paper, document, record, recording or *other material.*" 28 U.S.C. § 1826(a) (emphasis added). The Eighth Circuit, quoting from the Recalcitrant Witness Statute's legislative history, correctly emphasized that the "scope [of 'other information' and 'other material'] is intended to be *comprehensive*, including *all*

information given as testimony, but not orally," *Palmer*, 530 F.2d at 789 & n.3 (emphasis added). The "comprehensive" reach of the statutory phrases "other information" and "other material," encapsulating a broad "testimonial" obligation to produce physical things, is a compelling indication that Congress intended the corporate assets in this case to fit within the scope of the statute.

Second, and almost as an afterthought, Respondents claim another distinction between the circuits' decisions and the decision below. Regardless of their possible evidentiary use, Respondents contend that these items were sought *because* they were "objects of monetary value that are the property of the corporation in receivership." Opp. 10.

As a factual matter, this purported distinction is false because even the Government clearly believed that the assets that Armstrong was ordered to relinquish were *evidence* of his alleged criminality, regardless of their corporate nature. The original indictment alleged these assets as fruits and motives of the crime. In a July 2004 superseding indictment, the Government charged Armstrong with money laundering in connection with these assets. The Government also characterized Armstrong's non-production of these items as "direct evidence" of his guilt, and even sought a penalty enhancement for his purported obstruction of justice in failing to surrender them. Pet. 5. Further, seeking the assets as evidence,[3] the Receiver served Armstrong with a subpoena *duces tecum*, the traditional mode of compelling production of information to be used as evidence against a defendant in criminal and civil proceedings.

Armstrong thus stood on a legal footing indistinguishable from that of criminal defendants whom other circuits have held to receive the benefits of Section 1826 after they violated orders

3. The Receiver and joint provisional liquidators for one of corporate defendants executed an agreement, pledging to help the U.S. Attorney's Office, SEC and CFTC by collecting evidence for use in Armstrong's criminal and civil prosecutions. Pet. 3, n.1.

to produce tangible items that could have been used against them. The decision below conflicts with these well-reasoned cases.[4]

Respondents also fail to appreciate that Section 1826, by its terms, is triggered by a refusal to provide "other information" or "other material," regardless of the claimed purpose for which it is sought. To construe Section 1826 otherwise would frustrate the contempt procedure and only invite abuse (as this case amply demonstrates) by countenancing circumvention of the statute's protections simply by claiming that tangible items are sought for purposes other than to gather evidence or information.

In sum, Section 1826's text, case law, and legislative history forestall Respondents' attempts to explain away the undeniable conflict between the decision below and the rulings of other circuits. Review is needed to resolve this circuit split and to clarify the meaning of "other information" in the Recalcitrant Witness Statute.

II. Review Is Needed To Clarify The Scope And Meaning Of The Non-Detention Act.

Respondents' assertion that Congress did not intend Section 4001(a) to limit inherent judicial power to employ coercive confinements, Opp. 11, must fail in the face of Section 4001(a)'s plain language, which this Court has declared proscribes "detention *of any kind* by the United States" absent congressional authorization. *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original). The statute could hardly be clearer that "*No* citizen shall be imprisoned . . . *except* pursuant to an Act of Congress." 18

4. To say the decision below "did not disagree" with the Section 1826 cases by other circuits, Opp. 10, is misleading. In fact, the Second Circuit made no effort at all to explain how its decision was consistent with the decisions by the other circuits, or how the corporate assets in this case could fall outside the scope of the broad, common-law "testimonial" duty that Section 1826 codified.

U.S.C. § 4001(a) (emphasis added). Respondents' claim that Section 4001(a)'s "legislative history" – *i.e.*, a statement by a *single legislator* during the Congressional floor debates – "confirms" that it was not intended to supplant a court's inherent power to jail civil contemnors, Opp. 11 n.2, is refuted by the numerous authorities cited in the Petition. Pet. 14-17, nn. 9-11. Not only is such supposed legislative history an inherently unreliable source of legislative intent, *see* William N. Eskridge, *et al.*, *Legislative and Statutory Interpretation* 304 (2002), but Respondents' contention is also directly contrary to an *amicus* brief filed in *Padilla v. Hanft*, in which the Congressional sponsors of Section 4001(a) reiterated that it was intended to apply to *all* detentions. *See* Brief of *Amici Curiae* Original Congressional Sponsors of 18 U.S.C. § 4001(a) in Support of Petitioner, No. 05-533 (brief filed Dec. 13, 2005) ("Congr. Amici Br."), at 3.

Moreover, Respondents' concern that a literal construction of Section 4001(a)'s plain language would leave courts powerless to use coercive confinement to enforce their orders in situations where Section 1826 does not authorize confinement is overstated.[5] If there are civil contempts to which Section 1826 does not apply (and Respondents identify none), they are few. Moreover, courts still retain inherent authority to employ other coercive measures such as levying fines and sanctions, or shifting attorneys' fees, which provide the judiciary with ample authority to protect the administration of justice. But even if there are narrow classes

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5. Respondents' reliance on *Shillitani v. United States*, 384 U.S. 364 (1966), is misplaced. Opp. 11. Indeed, Congress passed Section 1826 in response to *Shillitani* to supplant its holding that contemnors could be confined indefinitely. *See generally In re Andrews*, 469 F. Supp. 171, 175 (E.D. Mich. 1979). Moreover, *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821), predated Section 1826's enactment, and *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), did not even involve incarcerated contemnors. Opp. 11.

of contempt proceedings outside the scope of Section 1826, resolution of that problem lies with Congress, not in a judicial jettisoning of Section 4001(a)'s unambiguous text.

Respondents argue that the Judiciary Act of 1789, which "implicitly vested" federal courts with inherent power to use coercive incarceration, authorized Armstrong's indefinite confinement because, according to Respondents, Section 4001(a) does not require that a statute "*explicitly* authorize [] detention." Opp. 12. Respondents' argument underscores the need for review to address an important question left open in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004): the specificity of detention language that the Non-Detention Act requires. In *Hamdi*, the Court divided evenly over whether a congressional resolution enacted after September 11 permitting the use military force granted the power to detain a U.S. citizen under Section 4001(a). Four Justices concluded that it "clearly and unmistakably" did, even though it used no specific detention language. Four other members of the Court disagreed, concluding that Section 4001(a) demands that a statute explicitly use the word "detention" or other, similar language, a view shared by the statute's congressional sponsors, Congr. Amici Br. at 3 (detention authority must be "*explicitly* grounded in statute") (emphasis added), and commentators, too, *e.g.*, Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 180, 190 (2004). Review is needed to resolve this important federal question.

In arguing that the criminal contempt statute, 18 U.S.C. § 401(3), provided an alternative grant of authority for Armstrong's indefinite civil confinement, Respondents claim that Section 401(3) uses the term "punish" "only in a generic sense relating to confinement, not in a more specific sense limited to confinement for criminal contempt." Opp. 13. The cases cited by Respondents for this proposition do not support it, however, because they merely assumed – but did not decide

– that Section 401(3) applies to civil contempt, and none addressed whether it authorizes *indefinite* civil detention with the clarity the Non-Detention Act requires. Tellingly, Respondents do not dispute that Section 401(3)'s applicability to civil contempt was left open in *Penfield Co. of Calif. v. SEC*, 330 U.S. 585 (1947), or challenge the persuasive historical and textual evidence cited in the Petition that the word "punish" in Section 401(3) refers only to criminal contempt. Pet. 18-20. Review is needed to clarify that Section 401(3) does not speak to civil contempt and lacks clear statutory language authorizing indefinite confinement for coercive, non-punitive purposes.

III. Due Process Requires That A Claim Of Inability To Comply Must Be Credited After Some Period Of Detention.

Respondents claim that there is no rule that, after some period of confinement that fails to induce compliance, a contemnor's claim of inability to comply must be credited. Opp. 14. While it is true that this Court has not drawn a precise line, it expressly has rejected the Second Circuit's holding below that a contemnor can be held *forever*.[6] Rather, *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948), held that "[h]is denial of possession *is given credit* after demonstration that a period in prison did not produce the goods." (Emphasis added). Following *Maggio*, the lower courts have recognized that past possession of property creates no permanent presumption that a contemnor continues to possess it at a later time; "[t]he presumption, strongest at the beginning, is diminished with the lapse of time, and is *completely dispelled by long delay*." *Wall v. Lowder*, 185 F. Supp. 654, 658

6. Despite Armstrong's urging, the District Court on remand did *not* release him on due process grounds based on the passage of time. Presumably, had the District Court found that Armstrong's confinement remained coercive, it would have continued his detention indefinitely.

(M.D.N.C. 1960) (emphasis added) (presumption ended after ten months). These courts properly imposed a time limit on the permissible length of confinement for civil contempt based on the immutable principle that a presumption of continued possession "grows weaker as time passes, *until it finally ceases to exist.*" *Brune v. Fraidin*, 149 F.2d 325, 327-28 (4th Cir. 1945) (emphasis added) (presumption ended after thirty-six months); *see also Marin v. Ellis*, 15 F.2d 321, 321 (8th Cir. 1926) (presumption expired within twenty-eight months); *In re Walt*, 17 F.2d 588, 593-94 (D. Minn. 1927) (presumption ended after two years).

The Second Circuit's rejection of these due process principles was not a "fact-bound" determination, Opp. 15, but represents a conflict with the holding in *Maggio* and the decisions of other courts cited above. Review is needed to reaffirm that the Due Process Clause limits the ultimate duration of confinement for civil contempt.

As stated in the Petition at Point III(B), the decision below also rejected the law of other circuits that detention is impermissibly punitive when no "substantial likelihood" exists that further detention will induce compliance. Pet. 25-29. At the April 2007 hearing, however, the District Court did not follow the Second Circuit on this point. Instead, it ended Armstrong's confinement, not because of his inability to comply, but because the confinement would have no further coercive effect. In light of the relief eventually granted, Armstrong no longer seeks certiorari on this point.

IV. This Case Is An Ideal Vehicle To Review The Important Questions Presented.

Respondents concede that the Petition is not moot, and argue only that it is not a good vehicle for review because Armstrong is no longer jailed for civil contempt. Opp. 16-17. But that is a distinction without a difference. If this Court

were to agree with the arguments and authorities cited in the Petition, Armstrong could be freed from the criminal sentence he is now serving based on time he already has served in civil contempt. In other words, there is no material difference between Armstrong and an incarcerated civil contemnor: both seek freedom from their current imprisonment. Thus, Armstrong's claims should be considered equally compelling.

Moreover, Respondents ignore the unique and historic nature of this case, which makes it a particularly appropriate vehicle to review the important questions raised herein. Armstrong, after all, was incarcerated for more than seven years, the longest term of civil contempt in the history of the federal courts. The fact that the District Court eventually abandoned the whole enterprise on the grounds that it failed to coerce in the first place only underscores the significance of the constitutional and statutory limitations whose applications are at issue in this case. As this Court held nearly sixty years ago, contempt never must become "a questionable experiment in coercion which will recoil to the discredit of the judicial process if time proves the adjudication to have been improvident and requires the courts to abandon its enforcement." *Maggio*, 333 U.S. at 67. Review is needed to reaffirm these principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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